127-678

No. 1359. *October Term, 1886.*

IN THE

Supreme Court of the United States.

W. L. Powell,
Plaintiff in Error,

vs.

The Commonwealth of Pennsylvania,
Defendant in Error.

BRIEF OF ARGUMENT FOR DEFENDANT IN ERROR *sur* MOTION TO DISMISS OR AFFIRM.

WAYNE MacVEAGH,
For Defendant in Error.

Allen, Lane & Scott, Printers, Nos. 229, 231, and 233 South Fifth Street, Philadelphia.

Supreme Court of the United States.

W. L. Powell

vs.

The Commonwealth of Pennsylvania.

October Term, 1886.

No. 1359.

BRIEF OF ARGUMENT *Sur* MOTION TO DISMISS OR AFFIRM.

The facts of the case as shown by the record are briefly these:—

The General Assembly of the State of Pennsylvania passed an act entitled "An act for the protection of the public health, and to prevent adulteration of dairy products and fraud in the sale thereof," which was approved May 21st, 1885, and took effect July 1st, 1885. Under the said act the plaintiff in error was indicted at the August sessions of the Court of Quarter Sessions of the Peace for the county of Dauphin, for violating the act on the 10th of July previous, by selling oleomargarine or imitation butter. He was duly convicted by a jury, and sentenced by the court to pay the costs of prosecution and a small fine. The case was carried to the Supreme Court of the State on the ground that the act under which he was convicted was unconstitutional. That tribunal affirmed the decision of the court below, declaring the constitutionality of the act. Thereupon Powell took out a writ of error from this court.

The allegations in the petition for the writ of error, upon which the writ was allowed, are that the said statute is repugnant to the Constitution of the United States in the following particulars :—

1. To the Fourteenth Amendment, in that it abridges the privileges and immunities of a citizen of the United States.

2. And in that it deprives a citizen of his property without due process of law.

3. To the Fifth Amendment, in that it takes private property for public use without just compensation.

The defendant in error submits that the statute in question contravenes none of the provisions of the Federal Constitution referred to, nor any other portion of that instrument. The law was purely a police measure within the well-settled powers of a State legislature to enact. There is no Federal question involved in the case, and this court has therefore no jurisdiction. But if technically, by reason of the averments of the petition, a construction of certain sections of the Constitution be involved, the decisions of this court clearly establish that the law of Pennsylvania in question is not unconstitutional. Under the practice, even if the Supreme Court has jurisdiction of a cause by reason of a Federal question being squarely raised before it, yet if the decision below is pursuant to precedents of the court a motion to affirm will be granted.

Swope *vs.* Leffingwell, 105 U. S., 3 ;
Micas *vs.* Williams, 104 U. S., 556;
Hinckley *vs.* Morton, 103 U. S., 764 ;
Schoonmaker *vs.* Gilmore, 102 U. S., 118;
Transportation Line *vs.* Cooper, 99 U. S., 78.

1. It is first charged that the law abridges the privileges and immunities of a citizen of the United States.

It is settled by the decisions in the Slaughter House Cases, 16 Wall., 36, and Bartemeyer *vs.* Iowa, 18 Wall., 133, that the privileges and immunities of citizens of the United States referred to in the Fourteenth Amendment, are confined to those which arise out of the nature and essential character of the National Government, the provisions of its Constitution, or its

laws and treaties made in pursuance thereof. The fundamental civil rights, for the security of which organized society is instituted, are privileges and immunities of citizens of the *States*, which remain under the care of the State Governments, and are not within the scope of the words "privileges and immunities" as used in the Federal Constitution. A glance at the Statute of Pennsylvania under consideration (which for convenience is printed at the end hereof), will show that the only privileges and immunities involved in it are the fundamental civil rights which by the solemn decision of this court are left solely in the care of the States. The alleged fundamental right to manufacture and sell a food product is the only right of which the defendant below was deprived. As it has been decided, this is not a privilege or immunity in the sense of the Fourteenth Amendment.

2. It is also objected that contrary to the Fifth Amendment of the Constitution private property has been taken for public use without just compensation.

Without going into an inquiry as to the truth of this charge, it is sufficient to point out that there is no provision of the Federal Constitution which prohibits a *State* from taking private property for public use without just compensation. The Fifth Amendment, it has been decided over and over again, is a limitation on the powers of the Federal Government, and not a restraint upon the States.

Barron *vs.* Mayor and City Council of Baltimore, 7 Pet., 243;
Withers *vs.* Buckley, 20 How., 84;
Twitchell *vs.* Commonwealth, 7 Wall., 321.

There can thus be no Federal question involved in this aspect of the case.

3. It is finally claimed that the statute deprives persons of property without due process of law, and in that respect violates the Fourteenth Amendment.

There is no allegation here, and the record does not show, that the oleomargarine or imitation butter, for the sale of which

Powell was indicted in the Quarter Sessions Court, was in his possession or was even in existence when the law was passed or when it went into effect. This should affirmatively appear before this court can take jurisdiction of the case on the ground alleged.

Beer Company *vs.* Massachusetts, 97 U. S., 33.

There was and is no pretense that the defendant's property was directly taken away from him by the act of the legislature. The only contention that can be made in this connection is that certain forms of machinery, or other property adapted to the manufacture of oleomargarine, was, perhaps, incidentally made less valuable because of the act. Such an effect on property is not a taking of property without due process of law within the meaning of the Constitution. This principle is declared in the decisions of this court which establish that prohibitory liquor laws of States, so long as they do not take away property in liquor in existence at the time of their going into effect, are not unconstitutional.

Foster *vs.* Kansas, 112 U. S., 201;
Beer Company *vs.* Massachusetts;
Bartemeyer *vs.* Iowa.

There is little legislation of a prohibitory nature, even within the conceded bounds of a State's constitutional power that does not affect—sometimes seriously affect—investments in forms of property related to the prohibited article. The whiskey manufacturer, whose business is taken away by a prohibitory liquor law, finds a less valuable lot of machinery on his hands, while the dealer in noxious drugs or adulterated provisions, whose trade is interdicted, finds his occupation gone, and his wares and fixtures deprived of, or curtailed in, their market; but neither the whiskey manufacturer nor the dealer in noxious drugs or provisions, has ever successfully assailed in this court prohibitory laws such as that at present before it, which only indirectly affects property values.

See Weil *vs.* Calhoun, 25 Fed. Rep., 872;
In re Brosnahan, 18 Fed. Rep., 66, 67.

The proceedings in the case, from the time of the indictment to the final affirmance by the Supreme Court of Penn-

sylvania of the judgment of the trial court, having been regular and according to the course of proceedings in such cases established by the law of Pennsylvania, there was no deprivation of property *without due process of law.* It is not possible to hold that a party has without due process of law been deprived of his property when, as regards the issues affecting it, he has by the laws of the State a fair trial in a court of justice, according to the modes of proceeding applicable to such cases.

Davidson *vs.* New Orleans, 96 U. S., 105;
Kennard *vs.* Morgan, 92 U. S., 480;
McMillen *vs.* Anderson, 95 U. S., 37;
Ex parte Wall., 107 U. S., 289, 290.

The present statute must be considered as fairly within the police powers of the State. It is a public measure of internal regulation, applying to all persons and to all sections in the State. There are no arbitrary provisions of the act, and there are no burdens or disabilities imposed by it upon one class of citizens that are not imposed upon all. As such a statute, nothing in the Fourteenth Amendment or in any other portion of the Constitution antagonizes it. A recent exposition of the Fourteenth Amendment by Mr. Justice Field in Barbier *vs.* Connolly, 113 U. S., 31, is a conclusive answer to the claim of the protection of the Constitution of the United States from such legislation as the present. The Justice says:—

The Fourteenth Amendment, in declaring that no State "shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should

be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that, in the administration of criminal justice, no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. But *neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity.* * * * Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good; though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.

It is therefore respectfully claimed that there is no Federal question involved in this case, and that either the writ of error should be dismissed, or the judgment should be affirmed on the ground that if any Federal questions are in fact raised, they have already been repeatedly decided adversely to the plaintiff in error.

WAYNE MacVEAGH,
For Defendant in Error.

APPENDIX.

ACT OF THE LEGISLATURE OF PENNSYLVANIA, 21ST MAY, 1885.

AN ACT

For the protection of the public health, and to prevent adulteration of dairy products and fraud in the sale thereof.

SECTION 1. *Be it enacted*, &c. That no person, firm, or corporate body shall manufacture out of any oleaginous substance or any compound of the same, other than that produced from unadulterated milk, or of cream from the same, any article designed to take the place of butter or cheese produced from pure unadulterated milk, or cream from the same, or of any imitation or adulterated butter or cheese, nor shall sell or offer for sale, or have in his, her or their possession with intent to sell, the same as an article of food.

SEC. 2. Every sale of such article or substance, which is prohibited by the first section of this act, made after this act shall take effect, is hereby declared to be unlawful and void, and no action shall be maintained in any of the courts of this State to recover upon any contract for the sale of any such article or substance.

SEC. 3. Every person, company, firm or corporate body who shall manufacture, sell or offer or expose for sale, or have in his, her or their possession with intent to sell, any substance, the manufacture and sale of which is prohibited by the first section of this act, shall, for every such offense, forfeit and pay the sum of $100, which shall be recoverable with costs by any person suing in the name of the Commonwealth as debts of like amount are by law recoverable; one-half of which sum when so recovered, shall be paid to the proper county treas-

urer for the use of the county in which suit is brought, and the other half to the person or persons at whose instance such a suit shall or may be commenced and prosecuted to recovery.

SEC. 4. Every person who violates the provisions of the first section of this act, shall be deemed guilty of a misdemeanor, and upon conviction, shall be punished by a fine of not less than $100, nor more than $300, or by imprisonment in the county jail for not less than ten nor more than thirty days, or both such fine and imprisonment for the first offense, and imprisonment for one year for every subsequent offense.

SEC. 5. It shall be the duty of constables of the several cities, boroughs, wards and townships of this Commonwealth, to make quarterly reports under oath to the courts of quarter sessions of all violations of any of the provisions of this act which may come or be brought to their notice, and it shall be the duty of the judges of the said courts to see that the said returns are made regularly and faithfully.

SEC. 6. This act shall take effect on the first day of July, 1885.

SEC. 7. All acts or parts of acts inconsistent with the provisions of this act are hereby repealed.

APPROVED—The twenty-first day of May, A. D. 1885.

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127-678

RECEIVED
OCT 3 1887
JAMES H. MCKENNEY,
CLERK

—IN THE—

Supreme Court of the United States,

No. OCTOBER TERM, 1887.

WILLAM. L. POWELL, Plaintiff in Error.

vs.

THE COMMONWEALTH OF PENNSYLVANIA, the Defendant in Error.

Motion to Advance Cause.

This is a writ of error in a criminal case to the Supreme Court of Pennsylvania. The plaintiff in error alleges that the Act of the General Assembly of the State of Pennsylvania prohibiting the manufacture and sale of oleomargarine is in conflict with the fourteenth (14) amendment to the Federal Constitution in the following respects:

(1.) In that it denies to him the *equal* protection of the law. (2.) In that it denies to him his right of personal liberty. (3.) In that it denies to him his right of personal property.

We join in the motion to advance. It is a test case, and many merchants and manufacturers, whose rights we believe are illegally infringed by this Act, will suffer irreparable lost if the argument of it goes over to 1890.

WEISS and GILBERT,

D. T. WATSON,

Attys. for Plaintiff in Error.

24-678
127-678

Office Supreme Court U. S.
FILED.
OCT 3 1887
JAMES H. McKENNEY,
CLERK.

—IN THE—

Supreme Court of the United States,

No. 914 OCTOBER TERM, 1887.

W. L. POWELL, Plaintiff in Error,

versus

THE COMMONWEALTH OF PENNSYLVANIA, Defendant in Error.

Motion to Advance Cause.

The pendency of this writ of error and the decision of this Court refusing to dismiss or affirm, and the uncertainty arising therefrom, as to whether the Act of the General Assembly of Pennsylvania prohibiting the manufacture or sale of oleomargarine is in conflict with the Federal Constitution, does embarrass the authorities of the State in enforcing the provisions of said Act, and I am informed that numerous prosecutions are stayed awaiting the decision of this Court.

It is of public interest and importance that the questions involved should be settled, and I therefore deem it my duty to respectfully urge upon this Court the speedy hearing of this case.

W. S. KIRKPATRICK,
Attorney General of Pennsylvania.

134-6 127-678

FILED
OCT 3 1887
JAMES H. McKENNEY
CLERK

—IN THE—

Supreme Court of the United States

No. October Term, 1887.

W. L. POWELL, Plaintiff in Error and Defendant Below.

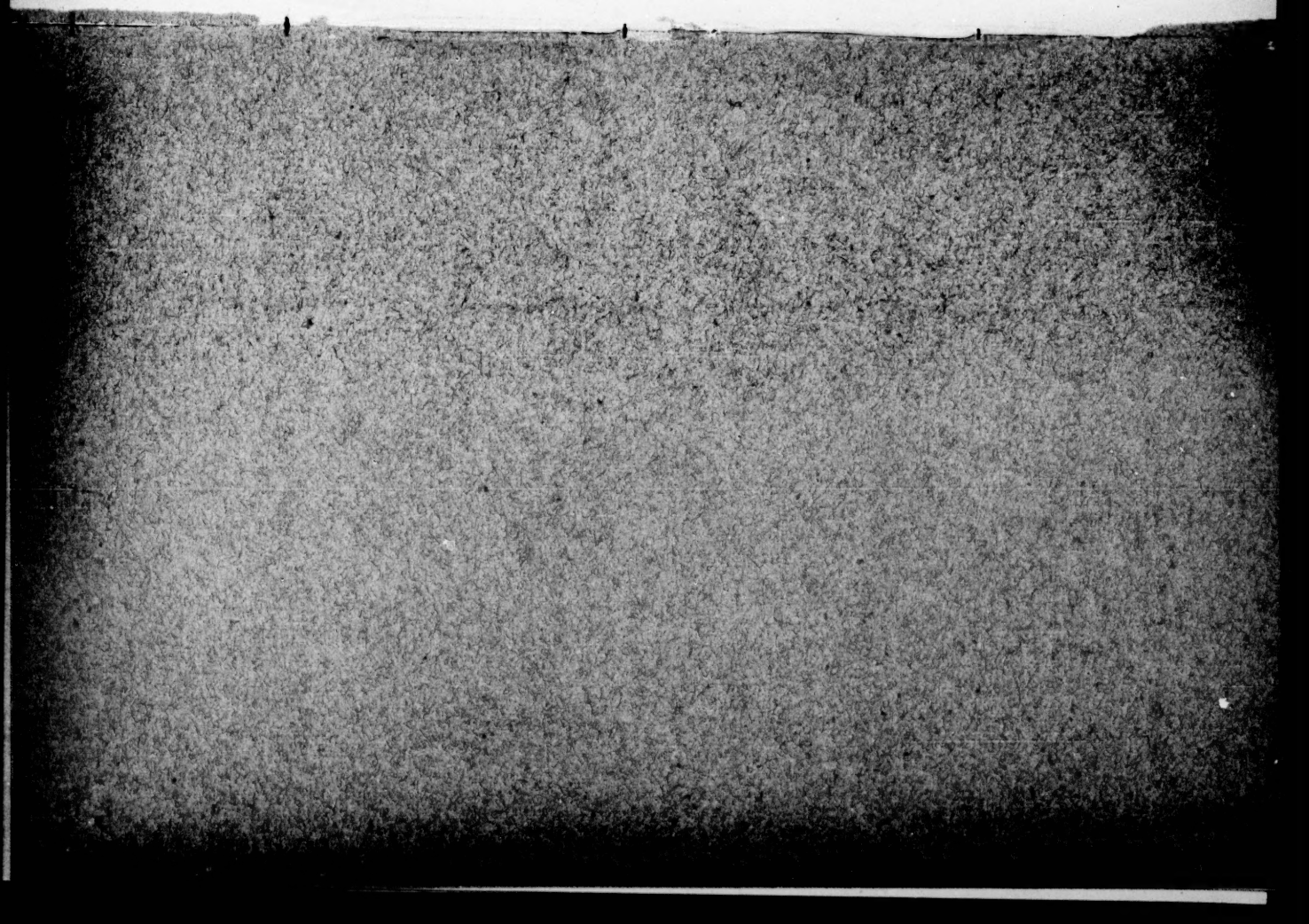
versus

The Commonwealth of Pennsylvania, the Defendant in Error and Plaintiff Below.

Motion to Advance Cause.

WAYNE McVEAGH,
S. J. McCARRELL, Geo Kunkel
District Att'y for Dauphin Co.,
Attys. for Deft. in Error.

J. A. REED: PRINT, 80 DIAMOND ST.



—IN THE—

Supreme Court of the United States,

No. OCTOBER TERM, 1887.

W. L. POWELL, Plaintiff in Error and Defendant below.

vs.

THE COMMONWEALTH OF PENNSYLVANIA, the Defendant in Error and Plaintiff below.

And now, October 3, 1887, comes the Commonwealth of Pennsylvania, the defendant in error, and moves the Court to advance this case and assigns as reasons therefor.

(*a*) That the State of Pennsylvania is embarrassed in the administration and enforcement of the Act ot Assembly, the constitutionality of which is attacked in this Court by reason of the pendency of this writ ot error. Especially is this so since this Court on the 2d day of May, 1887, denied the motion made by the defendant in error to dismiss or affirm the judgment of the State Court. Numerous cases are pending in the State Courts awaiting the decision in this case.

(*b*) The rights of property and of persons of numerous citizens of Pennsylvania, who are engaged in the manufacture or sale of oleomargarine, are directly involved.

(*c*) Substantially similar statutes to the one here involved —passed by the General Assembly of the State of Pennsylvania —have been passed by the States of New York, Ohio, Illinois and other States of the Union, and a decision of the questions involved in this case would be of much more than local appli-tion.

BRIEF OF ARGUMENT.

SUR-MOTION TO ADVANCE.

The General Assembly of the State of Pennsylvania passed, and the Governor of the State approved on the 21st day of May, 1885, an act entitled an act "For the protection of the public health and to prevent adulteration of dairy products and fraud in the sale thereof." A copy of this act is printed in the appendix. Under it many prosecutions were instituted in the State of Pennsylvania and among others one against Powell, the plaintiff in error, on the 10th day of July, 1885, by an information before an alderman in the city of Harrisburg. A true bill was found in the case on September 5th, 1885, and the case was tried on September 11th, 1885, when the plaintiff in error set up as his defense to the allegation that he had sold oleomargarine in contravention of the provisions of said Act of Assembly, that the said Act of Assembly was unconstitutional among other things in that it denied to him his rights of personal liberty and personal property. The trial Court sustained the constitutionality of the act and the plaintiff in error was convicted and sentenced. On the 16th day of March, 1886, a writ of error was taken to the Supreme Court of Pennsylvania. The case was argued before that Court and on the 3rd of January, 1887, by a divided court the judgment and sentence of the Court below were affirmed. To this judgment a writ of error was allowed and issued by this court on the 15th day of January, 1887, and the case was docketed as No. 1359, October Term, 1886. On the 25th day of April, 1887, the defendant in error filed a motion to dismiss or affirm, which after consideration this Court on the 2d day of May, 1887, denied.

Numerous cases are still pending in the trial courts of the State of Pennsylvania for violations of this so-called Oleomargarine Act, and in many of them, notably in Allegheny County in the Western portion of the State, proceedings have been stayed awaiting the ultimate decisions of this Court on the constitutionality of the act. The Commonwealth of Pennsylvania is embarrassed in the administration of this, one of her police laws, by reason of the pendency of this writ of error, and especially since this Court has deemed the questions involved of such character as to demand a full hearing. Until such hearing is

had probably none of the trial courts in the State of Pennsylvania would be inclined to convict and sentence violators of this law.

In justice to those whose capital is involved in the manufacture and sale of oleomargarine, it can also be said the case should be speedily decided, because while the Commonwealth is embarrassed by pending litigation in the enforcement of the provisions of this law, it is also true that those engaged in the manufacture and sale of oleomargarine at the time the act was passed are also greatly embarrassed in the prosecution of their business. If the act is unconstitutional this interference with their individual rights is to be deprecated.

Substantially similar statutes have been passed in many of the different states of this Union and questions more or less cognate to the ones involved in this case have been mooted in reference to each of these statutes. A final decision by the Court of ultimate resort as to whether such legislation does conflict with the Federal Constitution is very much to be desird.

WAYNE MacVEAGH,
S. J. McCARRELL,
District Att'y for Dauphin Co.,
Attys. for Deft. in Error.

APPENDIX.

AN ACT

For the protection of the public health, and to prevent adulteration of dairy products and fraud in the sale thereof.

SECTION 1. Be it enacted, &c., That no person, firm or corporate body shall manufacture out of any oleaginous substance or any compound of the same other than that produced from unadulterated milk or of cream from the same, any article designed to take the place of butter or cheese produced from pure unadulterated milk, or cream from the same, or of any imitation or adulterated butter or cheese, nor shall sell or offer for sale, or have in his, her or their possession with intent to sell the same as an article of food.

SEC. 2. Every sale of such article or substance, which is prohibited by the first section of this act, made after this act shall take effect, is hereby declared to be unlawful and void, and no action shall be maintained in any of the courts of this State to recover upon any contract for the sale of any such article or substance.

SEC. 3. Every person, company, firm or corporate body who shall manufacture, sell or offer or expose for sale, or have in his, her or their possession with intent to sell, any substance, the manufacture and sale of which is prohibited by the first section of this act, shall, for every such offense, forfeit and pay the sum of one hundred dollars, which shall be recoverable with costs by any person suing in the name of the Commonwealth as debts of like amount are by law recoverable; one-half of which sum, when so recovered, shall be paid to the proper County Treasurer for the use of the county in which suit is brought, and the other half to the person or persons at whose instance such a suit shall or may be commenced and prosecuted to recovery.

SEC. 4. Every person who violates the provisions of the first section of this act, shall be deemed guilty of a misdemeanor, and upon conviction, shall be punished by a fine not less than one hundred dollars, nor more than three hundred, or by imprisonment in the county jail for not less than ten nor more than thirty days, or both such fine and imprisonment for the first offense, and imprisonment for one year for every subsequent offense.

SEC 5. It shall be the duty of the Constables of the several cities, boroughs, wards and townships of this Commonwealth, to make quarterly reports under oath to the Courts of Quarter Sessions of all violations of any of the provisions of this act which may come or be brought to their notice, and it shall be the duty of the Judges of the said Courts to see that the said returns are made regularly and faithfully.

SEC. 6. This act shall take effect on the first day of July, one thousand eight hundred and eighty-five.

SEC. 7. All acts or parts of acts inconsistent with the provisions of this act are hereby repealed.

APPROVED—The 21st day of May, A. D., 1885.

ROBERT E. PATTISON.

127-6

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 1303.

HAY WALKER, JUNIOR, JOHN H. WILSON, EMIL WINTER, HARVEY WILSON AND GEORGE HASLEY, PLAINTIFFS IN ERROR,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

FILED NOVEMBER 16, 1887.

SEC 5. It shall be the duty of the Constables of the several cities, boroughs, wards and townships of this Commonwealth, to make quarterly reports under oath to the Courts of Quarter Sessions of all violations of any of the provisions of this act which may come or be brought to their notice, and it shall be the duty of the Judges of the said Courts to see that the said returns are made regularly and faithfully.

SEC. 6. This act shall take effect on the first day of July, one thousand eight hundred and eighty-five.

SEC. 7. All acts or parts of acts inconsistent with the provisions of this act are hereby repealed.

APPROVED—The 21st day of May, A. D., 1885.

ROBERT E. PATTISON.

127-699

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 1303.

HAY WALKER, JUNIOR, JOHN H. WILSON, EMIL WINTER, HARVEY WILSON AND GEORGE HASLEY, PLAINTIFFS IN ERROR,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

FILED NOVEMBER 16, 1887.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 1303.

HAY WALKER, JUNIOR, JOHN H. WILSON, EMIL WINTER, HARVEY WILSON AND GEORGE HASLEY, PLAINTIFFS IN ERROR,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, NOVEMBER 16, 1887.

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a UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the supreme court of the State of Pennsylvania, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said supreme court before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Hay Walker, Jr., John H. Wilson, Emil Winter, Harvey Wilson, and George Hasley, plaintiffs in error, and The Commonwealth of Pennsylvania, defendant in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity, or wherein was drawn in question the validty of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution
b or of a treaty or statute of or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said plaintiffs in error, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the eleventh day of November, in the year of our Lord one thousand eight hundred and eighty-seven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
JOSEPH P. BRADLEY,
Associate Justice of Sup. C't U. S.

[Endorsed:] Filed Nov. 12, 1887.

c The United States of America to the Commonwealth of Pennsylvania, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on

the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Pennsylvania, wherein Hay Walker, Jr., John H. Wilson, Emil Winter, Harvey Wilson, and George Hasley are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Joseph P. Bradley, associate justice of the Supreme Court of the United States, this eleventh day of November, in the year of our Lord one thousand eight hundred and eighty-seven.

JOSEPH P. BRADLEY,
Asso. Justice.

d [Endorsed:] Hay Walker, Jr., *et al. vs.* The Commonwealth of Pennsylvania. Filed Nov. 12, 1887.

I accept service of within citation this 12th day of November, A. D. 1887.

W. D. PORTER,
District Attorney for Allegheny County,
Attorney for Defendant in Error.

On this — day of ——, in the year of our Lord one thousand eight hundred and eighty- —, personally appeared —— —— before me, the subscriber, and makes oath that he delivered a true copy of the within citation to —— ——.

—— ——.

Sworn to and subscribed the — ——, A. D. 188–.

—— ——.

e The answer of the justices of the supreme court of the State of Pennsylvania to the writ of error of the Supreme Court of the United States hereunto annexed as follows, to wit:

Among the records and proceedings and rolls in the court of quarter sessions in and for the county of Allegheny, in the Commonwealth of Pennsylvania, at No. 398, March sessions, 1887, and which was removed by writ of error to this court, is contained the following:

f *City Information.*

COMMONWEALTH OF PENNSYLVANIA,
City of Pittsburgh, County of Allegheny, } *ss:*

COMMONWEALTH OF PENNSYLVANIA
vs.
PITTSBURGH MELTING CO., Limited—HAY WALKER, Jr., Treasurer

Before me, the subscriber, M. F. Cassidy, an alderman in and for said city, personally came S. J. Adamson, who, upon oath, admin-

istered according to law, deposes and says that, at Allegheny City, in the county of Allegheny, on the 2 day of Feb'y, A. D. 1887, def'ts did, on the above date, sell and expose for sale butter made out of oleoginous substance or some other compound, contrary to act of Assembly in such cases made and provided. Complainant therefore prays and desires that a warrant may issue and the aforesaid defendant, Pittsburgh Melting Co., Limited—Walker—may be held to answer this charge of misdemeanor; and further deponent saith not.

—— ——.

Sworn to and subscribed before me this 8 day of Feb'y, A. D. 1887.

M. F. CASSIDY, *Alderman.* [SEAL.]

—— tent. in $50.00, sub. con. to appear at and throughout March session of court of quarter session of said county to testify, etc.

Taken before me this February 17th *day of*, 1887.

M. F. CASSIDY. [SEAL.]

March Term, A. D. 1887.

COMMONWEALTH
vs.
PITTSBURGH MELTING Co., Limited—HAY WALKER, Jr., Manager.

We and each of us, Hay Walker, Jr., manager, and M. J. Sullivan, do acknowledge ourselves, jointly and severally, indebted to the Commonwealth of Pennsylvania in the sum of three hundred dollars, lawful money of the United States of America, to be levied of our and each of our lands and tenements, goods and chattels, conditioned that the said Pittsburgh Melting Co., Limited—Hay Walker, Jr., manager—shall be and appear at the March term of court of oyer and terminer and quarter sessions for the county of Allegheny on the first Monday of March, 1887, at the city of Pittsburgh, then and there to answer the above charge — misdemeanor, as may be preferred against the said —— ——, and shall abide and not depart the court without leave, and shall in the meantime keep the peace and be of good behavior towards all citizens of the Commonwealth, and more especially toward S. J. Adamson.

HAY WALKER, JR. [SEAL.]
M. J. SULLIVAN. [SEAL.]

Taken and acknowledged before me this 17 day of February, A. D. 1887.

M. F. CASSIDY, *Alderman.*

g [Endorsed:] No. 398. March term, A. D. 1887. Commonwealth of Pennsylvania *versus* Pittsburgh Melting Co., "Limited"—Hay Walker, Jr., manager. Charge, misdemeanor. Information made Feb'ry 8th, 1887, on oath of S. J. Adamson. *Coram.* M. F. Cassidy, alderman. Costs, $—. Pros. priv. counsel, —— ——; def't's counsel, —— ——. Pros. found, S. J. Adamson, Jefferson, Greene Co., Pa.; def't found, 37 Third St., Allegheny City. Officer, Wm. Maneese. Filed March 7th, 1887.

COMMONWEALTH
vs.
PITTSBURGH MELTING COMPANY, Limited—HAY WALKER, Jr., Manager.

Charge: Misdemeanor.

Warrant issued to Wm. Maneese, constable, Feb'ry 8th, 1887, on oath of S. J. Adamson.

And now, Feb'ry 17th, 1887, —— tent. in $50.00, sub. con. that the complainant, S. J. Adamson, will appear at the next court of quarter sessions to testify, etc.

And now, Feb'ry 17, 1887, Hay Walker, Jr., def't, arrested and brought to office and entered bail in the sum of three hundred dollars for his appearance Feb'y 19, 1887, and now, Feb'ry 17th, 1887, defendant waives a hearing and enters bail in the sum of three hundred dollars for his appearance at the March term of court of quarter sessions.

CITY OF PITTSBURGH, } ss:
County of Allegheny, }

I, an alderman in and for said city, certify that the above is a true transcript from my docket, and that the recognizances were duly taken and acknowledged before me as aforesaid.

In witness whereof I hereunto set my hand and seal, at the city of Pittsburgh, this 5th day of March, A. D. 1887.

M. F. CASSIDY, *Alderman.* [SEAL.]

Information	30	
Entry	25	
Warrant	50	
Def't's recog. for hearing	50	
Commitment		
Release to jailer		
Subpœna		
Writing ex. of def't	50	
Hearing	50	
Continuance		
Oath	10	
Pros. recog.	30	
Def't	30	
Trans. and cert.	50	
	——	3 75
Witness, S. J. Adamson		56
Constable		
Executing warrant	1 00	
Mileage	20	
Serving subpœna		
Executing commitment		
	——	1 20
		5 51

1 ALLEGHENY COUNTY, *ss:*

In the Court of Quarter Sessions of the Peace for Allegheny County, of March Sessions, 1887.

The grand inquest of the Commonwealth of Pennsylvania, now inquiring in and for the body of the county of Allegheny, upon their oaths and solemn affirmations, respectively, do present that Hay Walker, the younger, late of said county, yeoman; John H. Wilson, late of said county, yeoman; George Hasley, late of said county, yeoman; Emil Winter, late of said county, yeoman; and Harvey Wilson, late of said county, yeoman, doing business as the Pittsburgh Melting Company, Limited, on the second day of February, in the year of our Lord one thousand eight hundred and eighty-seven, at the county aforesaid and within the jurisdiction of this court, unlawfully did then and there manufacture out of a certain oleaginous substance other than that produced from unadulterated milk and of cream from the same large quantities of a certain article designed to take the place of butter produced from pure unadulterated milk and of cream from the same, contrary to the form of the act of the General Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

And the inquest aforesaid, upon their oaths and solemn affirmations aforesaid, do further present that the said Hay Walker,
2 the younger, the said John H. Wilson, the said George Hasley, the said Emil Winter, and the said Harvey Wilson, so as aforesaid doing business as the Pittsburgh Melting Company, Limited, on the day and year aforesaid, at the county aforesaid, and within the jurisdiction of this court, unlawfully did then and there manufacture a large quantity of a certain imitation and adulterated butter, the components and description of said imitation and adulterated butter being to said inquest unknown, contrary to the form of the act of the General Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

And the inquest aforesaid, upon their oaths and solemn affirmations aforesaid, do further present that the said Hay Walker, the younger, the said John H. Wilson, the said George Hasley, and the said Emil Winter, and the said Harvey Wilson, so as aforesaid doing business as the Pittsburgh Melting Company, Limited, on the day and year aforesaid, at the county aforesaid, and within the jurisdiction of this court, unlawfully did then and there sell to one S. J. Adamson, as an article of food, one tub of a certain article designed to take the place of butter produced from pure, unadulterated milk and cream from the same, the said article designed to take the place of butter as aforesaid being manufactured out of a certain oleaginous substance and a compound of the same other than that produced from unadulterated milk and of cream from the same, contrary to the form of the act of the General Assembly in such
3 case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

And the inquest aforesaid, upon their oaths and solemn affirmations aforesaid, do further present that the said Hay Walker, the younger, the said John H. Wilson, *of* said George Hasley, the said Emil Winter, and the said Harvey Wilson, so as aforesaid doing business as the Pittsburgh Melting Company, Limited, on the day and year aforesaid, at the county aforesaid, and within the jurisdiction of this court, unlawfully did then and there sell as an article of food to one S. J. Adamson one tub of a certain imitation and adulterated butter, the components and description of said imitation and adulterated butter being to said inquest unknown, contrary to the form of the act of the General Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

And the inquest aforesaid, upon their oaths and solemn affirmations aforesaid, do further present that the said Hay Walker, the younger, the said John H. Wilson, the said George Hasley, the said Emil Winter, and the said Harvey Wilson, so as aforesaid doing business as the Pittsburgh Melting Company, Limited, on the day and year aforesaid, in the county aforesaid, and within the jurisdiction of this court, unlawfully did then and there have in their possession, with intent to sell as an article of food, a large quantity of a certain article designed to take the place of butter produced from pure, unadulterated milk and cream from the same, the said
4 article designed to take the place of butter, as aforesaid, being manufactured out of an oleaginous substance and a compound of the same other than that produced from unadulterated milk and the cream from the same, contrary to the form of the act of the General Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

And the inquest aforesaid, upon their oaths and solemn affirmations aforesaid, do further present that the said Hay Walker, the younger, the said John H. Wilson, the said George Hasley, the said Emil Winter, and the said Harvey Wilson, so as aforesaid doing business as the Pittsburgh Melting Company, Limited, on the day and year aforesaid, at the county aforesaid, and within the jurisdiction of this court, unlawfully did then and there have in their possession, with intent to sell as an article of food, a large quantity of a certain imitation and adulterated butter, the components and description of said imitation and adulterated butter being to said inquest unknown, contrary to the form of the act of the General Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

And the inquest aforesaid, upon their oaths and solemn affirmations aforesaid, do further present that the said Hay Walker, the younger, the said John H. Wilson, the said George Hasley, the said Emil Winter, and the said Harvey Wilson, so as aforesaid doing business as the Pittsburgh Melting Company, Limited, on the
5 day and year aforesaid, at the county aforesaid, and within the jurisdiction of this court, unlawfully did then and there manufacture out of a certain oleaginous substance other than that produced from unadulterated milk and of the cream from the same

a large quantity of a certain article designed to take the place of butter produced from pure, unadulturated milk and of cream from the same, contrary to the form of the act of the General Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

And the inquest aforesaid, upon their oaths and solemn affirmations aforesaid, do further present that the said Hay Walker, the younger, the said John H. Wilson, the said George Hasley, the said Emil Winter, and the *same* Harvey Wilson, so as aforesaid doing business as the Pittsburgh Melting Company, Limited, on the day and year aforesaid, at the county aforesaid, and within the jurisdiction of this court, unlawfully did then and there manufacture a large quantity of a certain imitation and adulterated butter, with intent to sell the same as an article of food, the components and description of said imitation and adulterated butter being to said inquest unknown, contrary to the form of the act of the General Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

W. D. PORTER,
Dist. Att'y for Allegheny Co.

Fab pro respub.,
S. J. ADAMSON.

Sworn by me.

MORRIS N. MEAD, *Foreman.*

[Endorsed:] No. 398. Att. for pros. issued May 12, 1887. March sessions, 1887. Commonwealth *vs.* Hay Walker, Jr., *et al.* Indictment, misdemeanor. Prosecutor, S. J. Adamson. On Ap'l 27, 1887. True bill. Morris W. Mead, foreman. May 12th, 1887. Def'ts severally plead *non cul et de hoc;* dist. att'y: Similiter. Issue joined.

[Endorsed:] Guilty. May 12th, 1887. $100 fine and costs.

6 March Sessions, 1887.

COMMONWEALTH OF PENN'A
vs.
HAY WALKER, Jr., JOHN H. WILSON, EMIL WINTER, and HARVEY WILSON. } No. 398.

Indictment.—Misdemeanor in—1st count, manufacturing oleomargarine; 2nd count, selling oleomargarine; 3rd count, having in possession, &c.

12TH MAY, 1887.

Jury sworn.

Dist. Att'y Porter and J. F. Slagle, Esq., for Com.; D. T. Watson and W. B. Rodgers, Esqs., for def'ts.

Testimony for the Commonwealth.

Admission and agreement of def'ts admitting the commission of the acts charged in the indictment as follows:

Nunc pro ut and hereto attached.

7 *Admission of Def'd'ts.*

That the defendants sold in Allegheny county, Pennsylvania, on the 2nd day of Feb., 1887, as an article of food, to S. J. Adamson, the prosecuting witness in this case, one original package of an article manufactured in Allegheny county, Pennsylvania, by the defendants out of oleaginous substances and compounds other than that produced from unadulterated milk or cream from the same and designed to take the place of butter produced from unadulterated milk or cream; that the said package was sold and bought as oleomargarine or butterine and not as butter produced from pure, unadulterated milk or cream from the same, and that the said defendants had in their possession, with intent to sell the same as an article of food, the said package; and that the said package when sold was marked with the words "Oleomargarine butter" upon the lid and side of the package, in a straight line, in Roman letters one-half an inch long, as provided in the act of the General Assembly of this State, entitled An act for the protection of dairymen and to prevent deception in sales of butter and cheese, approved May 24th, 1883.

8 1*st Offer.*

Offer A.

The defendants now offer to prove that prior to the 21st day of May, A. D. 1885, and on the 10th day of May, 1881, they were and they ever since have been and still are citizens of the State of Pennsylvania, residing within the county of Allegheny, in said State, and that on May the 10th, 1881, they associated themselves as a voluntary partnership organization (authorized by the laws of the State of Pennsylvania) under the name of the Pittsburgh Melting Company, for the purpose of the manufacture and sale of oleomargarine or butterine, it being an article manufactured out of oleaginous substances and compounds other than that produced from unadulterated milk or cream from the same, and designed to take the place of butter produced from unadulterated milk or cream; that on the 10th day of May, 1881, and prior thereto, there was no statute or law in the State of Pennsylvania prohibiting such manufacture and sale, but, on the contrary thereof, there was in force an act of the General Assembly of the State of Pennsylvania entitled "An act to prevent deception in the sale of butter and cheese," approved May 22nd, 1878, and that subsequent thereto the General Assembly of this State passed and the Governor approved an act entitled An act for the protection of dairymen and to prevent deception in the sale of butter and cheese, the said act being approved May 24th, 1883,

and with this offer the defendants offer in evidence each of
9 the said acts.

That for the purpose of the manufacture of the said oleomargarine and butterine the said defendants, under the name of the Pittsburgh Melting Company, purchased a large quantity of

machinery in the years 1881, 1882, and 1883, especially made for and adapted to the manufacture of the said oleomargarine or butterine, and erected the said machinery in a building for that purpose, and prior to the 1st day of January, A. D. 1885, the said defendants, under the name of the Pittsburgh Melting Company, had invested in said machinery a sum of money exceeding $20,000, of which sum the defendant, Hay Walker, contributed ten thousand dollars ($10,000).

That the said defendants continued to manufacture with the said machinery said oleomargarine or butterine and to sell said manufactured product up — and until and including the 21st day of May, 1885, at which time an act was passed by the General Assembly of the State of Pennsylvania and approved by the Governor of said State, entitled An act for the protection of the public health and to prevent adulteration of dairy products and fraud in the sale thereof, which act defendant offers in evidence, it being the same act under which the indictment in this case is found.

That after the passage and approval of the said act of May 21, 1885, the said defendants continued, just as before its passage, to manufacture by the use of the said machinery, but not otherwise, said oleomargarine or butterine and to sell the same,
10 and the identical package of oleomargarine or butterine which was sold to the prosecuting witness was manufactured by the said defendants subsequent to the 21st day of May, 1885, but solely by the use of the said machinery purchased, as aforesaid, prior to said 21st day of May, 1885; that said defendants, in the carrying on of their said business and in the manufacture of the said oleomargarine or butterine and in the manufacture of the identical package of oleomargarine or butterine hereinbefore specified, which was sold to the prosecuting witness in this case, used only pure animal fats; that the process of its manufacture was clean and wholesome; that the article manufactured contained the same elements as pure buttter; that the only difference between them is that the manufactured article contains a smaller proportion of a fatty substance, which is known as butterine; that this butterine exists in pure butter in the proportion of from three to seven per cent. and in the manufactured article in a smaller proportion, and this was increased in the manufactured article by the introduction of milk and cream.

That this having been done, the article sold and manufactured contains all the elements of pure butter produced from pure, unadulterated milk or cream from the same, except that the percentage of butterine is slightly smaller; that the only effect of butterine is to give flavor to the butter, and it has nothing to do with its wholesomeness; that the oleoginous substances in the manufactured article are substantially identical with those produced from
11 milk or cream, and that the article manufactured and sold by the defendents to the prosecuting witness is a wholesome and nutritious article of food made, as hereinbefore stated, by the use of machinery and appliances purchased and owned by said defendant prior to the 21st day of May, 1885, and that the said butterine or oleomargarine, as manufactured and sold to the prose-

cuting witness, was in all respects as wholesome and healthful as butter produced from pure, unadulterated milk or cream from the same.

That the said act of May 21st, 1885, prevents the said defendants from using the said machinery as aforesaid for the manufacture of oleomargarine or butterine, and that by such deprivation the said machinery is much depreciated in value and rendered almost useless, and instead of being worth the sum of $20,000, as it would be if used for the said purposes for which it was made or used, it is rendered of much less value, being worth only the sum of $5,000.

That prior to the said 21st day of May, 1885, and on the 10th day of May, 1881, the said defendants expended considerable sums of money and went to great labor to fit themselves for the pursuit of the calling of the manufacture and sale of oleomargarine or butterine, and that they then (May 10th, 1881) adopted the manufacture and sale of said oleomargarine and butterine as their occupation or calling in life, and continued from thence up until after the passage of the said act of May 21st, 1885, in the pursuit of their calling and occupation in life and made therefrom large gains and profits,

12 and that in the manufacture of the said oleomargarine or butterine during all said time the process of manufacture, the articles out of which it was manufactured, and the oleomargarine and butterine manufactured and sold was as hereinbefore stated.

That there was neither deceit nor fraud practiced in either the manufacture or sale of any of the oleomargarine nor was it an adulterated product.

That the said act of May 21st, 1885, in prohibiting the manufacture or sale of the said oleomargarine or butterine deprives the defendants of the gains and profits they had made in their calling and occupation and in the manufacture and sale of the said oleomargarine and butterine, besides rendering of much less value the machinery in which the said defendants invested as aforesaid and depriving the defendants of their calling or occupation in life.

And this for the purpose of showing—

1st. That the manufacture and sale of oleomargarine or butterine, for which the defendants are indicted, in no way injuriously affects the health, morals, peace, or the good order of society, or of any citizen or resident of the State of Pennsylvania, and that the said oleomargarine or butterine manufactured and sold is not an adulteration of a dairy product, nor is it an adulterated article.

2nd. That the said act of May 21st, 1885, is not an exercise of or within the police power of the State of Pennsylvania.

13 3rd. That the said act of May 21st, 1885, is in conflict with and repugnant to the provisions of the 14th amendment of the Constitution of the United States, in that (*a*) it deprives the defendants of their liberty without due process of law; (*b*) in that it deprives the defendants of their property without due process of law; and (*c*) in that it denies to the defendants the equal protection of the laws of the State of Pennsylvania.

4th. That the said act is in conflict with and repugnant to the provisions of the constitution of the State of Pennsylvania, in that it

takes from the defendants their calling and property without due process of law and without compensation, and also in that it strikes down one industry (that of the manufacture and sale of oleomargarine) to benefit another industry (that of the manufacture and sale of butter produced from milk or cream).

14 *Objections to Offer A.*

Counsel for the Commonwealth object to the evidence offered by defendants upon the following grounds:

1st. The evidence is not material.

2nd. It is not relevant.

3rd. Even if the facts set forth in the offer were established by proof they would not constitute a legal defence.

Ruling of the Court.

By the COURT: The recent case of Powell *vs.* The Commonwealth, decided by the supreme court of Penna. in January of this year, in our opinion, decides the questions raised by this offer, and is binding on us.

The objections to def'ts' offer A are sustained; the evidence is excluded; to which ruling of the court counsel for def'ts except, and thereupon bill sealed for def'ts.

THOS. EWING. [SEAL.]

Def'ts' counsel now offers to prove offer B.

15 *2nd Offer.*

Offer B.

The defendants now offer to prove that on and prior to the 21st day of May, 1885, their occupation or calling in life was the manufacture and sale of oleomargarine or butterine in Allegheny county, Pennsylvania, and that prior to May 21st, 1885, and in said county, in order to fit and prepare themselves for such occupation or calling, they had expended considerable sums of money and gone to great labor.

That in pursuance of their occupation and calling in life the defendants did, after May 21st, 1885, manufacture and sell to the prosecuting witness the package of oleomargarine, and that said oleomargarine was made solely from pure animal fats, and the process of its manufacture was clean and wholesome, and that said oleomargarine is a wholesome and nutritious article of food, and in all respects as wholesome and healthful as pure butter produced from pure, unadulterated milk or cream from the same; that there was no fraud or deception in either the manufacture or sale of said oleomargarine, and that said oleomargarine was not an adulterated product.

This for the purpose of showing—

1st. That by the said act of May 21st, 1885, the defendants are deprived of their liberty and property without due process of law.

16 2nd. That by the said act of May 21st, 1885, the defendants are denied the equal protection of the laws of the State of Pennsylvania.

3rd. That the said act of May 21st, 1885, is repugnant to the provisions of the 14th amendment to the Constitution of the United States.

4th. That the said act of May 21st, 1885, is not an exercise of or within the police powers of the State of Pennsylvania.

5th. That the said act of May 21st, 1885, is in conflict with and repugnant to the provisions of the constitution of the State of Pennsylvania.

Counsel for the Commonwealth object to the evidence offered for the reason that it is not relevant and it is not material. The act forbids the manufacture and sale of the article, and it is not material to the inquiry in this case whether it was sold openly or not, nor whether it was pure or adulterated.

Ruling on Offer B and Objections thereto.

The objections are sustained; the testimony offered is excluded. And thereupon bill sealed for def'ts.

THOS. EWING. [SEAL.]

Def'ts' counsel offers to prove offer C.

17 *3rd Offer.*

Offer C.

The defendants propose to prove by M. J. Sullivan that he saw the article sold to the prosecuting witness manufactured by defendants; that it was made from pure animal fats; that the process of manufacture was clean and wholesome; that the article contains the same elements as dairy butter; that the only difference between them is that the manufactured article contains a smaller proportion of the fatty substance known as butterine; that this butterine exists in dairy butter in the proportion of from three to seven per cent. and in the manufactured article in a smaller proportion, and was increased in the manufactured article by the introduction of milk and cream; that this having been done, the article contains all the elements of butter produced from pure, unadulterated milk or cream from the same, except that the percentage of butterine is slightly smaller; that the only effect of butterine is to give flavor to the butter and has nothing to do with its wholesomeness; that the oleaginous substance in the manufactured article are substantially identical with those produced from milk or cream; that the article sold by the defendants to the prosecutor was a wholesome and nutritious article of food and in all respects as wholesome and healthful as butter produced from pure, unadulterated milk or cream from the same.

18 This for the purpose of showing—

1st. That the said act of May 21st, 1885, is not within or an exercise of the police powers of the State of Pennsylvania.

2nd. That the said act of May 21, 1885, is repugnant to and in conflict with the provisions of the fourteenth (14th) amendment to the Constitution of the United States.

3rd. That the said act of May 21, 1885, deprives the defendant of his property and liberty without due process of law, and denies to him the equal protection of the laws of the State of Pennsylvania.

4th. That said act of May 21, 1885, is in conflict with the constitution of the State of Pennsylvania, in that it deprives him of his liberty or property without due process of law and without compensation.

Counsel for the Commonwealth object to the evidence for the reason that it is irrelevant and immaterial, and the evidence, if true, would not go to constitute a defence.

Ruling.

The objections are sustained and bill sealed for the defendants.

THOS. EWING. [SEAL.]

19 In the Court of Quarter Sessions of Allegheny County, Pennsylvania.

THE COMMONWEALTH OF PENNSYLVANIA

vs.

HAY WAKER, Jr., *et al.*

The defendants ask the court to charge the jury as follows:

1st. That the act of the General Assembly of the Commonwealth of Pennsylvania, entitled "An act for the protection of the public health and to prevent the adulteration of dairy products and fraud in the sale thereof," approved May 21st, 1885, is repugnant to the provisions of the 14th amendment of the Constitution of the United States, in that it did and does deny to the defendants, persons within the jurisdiction of the State of Pennsylvania, the equal protection of the laws of the State of Pennsylvania.

2nd. That the act of the General Assembly of the Commonwealth of Pennsylvania, entitled "An act for the protection of the public health and to prevent the adulteration of dairy products and fraud in the sale thereof," approved May 21st., 1885, is repugnant to the provisions of the 14th amendment of the Constitution of the United States, in that it did and does deprive the defendants of their

20 liberty without due process of law.

3rd. That the act of the General Assembly of the Commonwealth of Pennsylvania, entitled "An act for the protection of the public health and to prevent the adulteration of dairy products and fraud in the sale thereof," approved May 21st, 1885, is repugnant to the provisions of the 14th amendment to the Constitution of the United States, in that it did and does deprive the defendants of their property without due process of law.

4th. That the said act of the General Assembly, approved May 21st, 1885, is not an exercise of nor is it within the police powers of the State of Pennsylvania.

5th. That the said act of the General Assembly, approved May 21st, 1885, is repugnant to the provisions of the constitution of the State of Pennsylvania, in that it deprives the defendants of their liberty and property without due process of law and without compensation.

6th. That under the constitution of the State of Pennsylvania such class legislation in favor of one industry (dairy products) at the expense of another (oleomargarine) is illegal and void.

21 These questions having been passed on by the supreme court of the State and decided aversely to the contention of the defendants, they are refused.

To the refusal of the court to affirm their points and to the charge of the court counsel for the def'ts except, and thereupon bill sealed for defendants.

THOS. EWING. [SEAL.]

22 *Charge of the Court.*

GENTLEMEN OF THE JURY: The different counts in this indictment charge the defendants with violation of the act of Assembly, approved 21st May, 1885, entitled an act for the protection of dairymen and to prevent deception in sales of butter and cheese.

The supreme court of the State, in the case of Powell *vs.* The Commonwealth, a case that went up from the court of quarter sessions of Dauphin county, has passed on this act and declared it constitutional.

That case seems to decide against the defendants all the questions they have attempted to raise here.

The defendants admit the commission of the acts charged in the indictment. The acts admitted are in violation of the act of Assembly, and the verdict should be guilty as indicted, if you believe the uncontradicted evidence.

23 March Sessions, 1887.

Court of quarter sessions met on Thursday, May 12th., 1887, at 9.30 a. m.

Present: Hon. Thos. Ewing.

Court opened by the crier, J. W. Patterson, Esq.

COMMONWEALTH *vs.* HAY WALKER, Jr., *et al.* } 398.

And now, May 12th, 1887, the def'ts, being severally present in open court, severally plead *non cul et de hoc*; dis't att'y similiter; issue joined. Same day, a jury being called, there came John Ginley, R. B. Phillips, Levi Gregg, Thos. Tracey, David Fitzsimmons,

Jno. Hope, Conrad Fisher, J. C. Cubbage, B. Lydon, Jno. Reese, Chas. Garber, John McCollum, twelve good and lawful men, duly summoned, returned, elected by ballot, impaneled, and sworn, who, upon their solemn oaths, do respectively say, *eo die*, that they find the defendants severally guilty, and so say they all. *Eo die*, the court sentenced the def'ts, they being severally present in open court, to pay a fine of $100 to the Commonwealth and pay the costs of prosecution. And now, June 9th, 1887, writ of error allowed to be issued with def'd'ts filing a bond, with surety to be approved by
24 one of the judges of the court of quarter sessions of Allegheny county, in the sum of $500, conditioned for the appearance of def'd'ts at the first term of court after judgment entered in said writ of error, and not to depart said court without leave, &c., and *as* the approval of said bond all proceedings in the court of quarter sessions of Allegheny county stayed.

(Signed) SILAS M. CLARK,
Justice of Supreme Court.

JUNE 11*th*, 1887.

Recognizance of Hay Walker, Jr., with M. J. Sullivan and Sam'l Dunlevy as sureties, and with approval of Hon. F. H. Collier, filed; same day, writ of error from prothonotary of supreme court filed.

25 COMMONWEALTH OF PENNSYLVANIA, } ss:
County of Allegheny, }

I, D. K. McGunnegle, clerk of the court of quarter sessions in and for said county, do hereby certify that the within and foregoing is a just, full, true, and correct copy of the record and proceedings at No. 398, March sessions, 1887, in the case of the Commonwealth *versus* Hay Walker, Jr., *et al.*, as the same remains on file and of record in my office.

Indictment: Misdemeanor.

Witness my hand and the official seal of said court, at Pittsburgh, this 18th day of May, A. D. 1887.

D. K. McGUNNEGLE, *Clerk.*

[Endorsed:] No. 398. March sessions, 1887. Copy of record *vs.* Hay Walker, Jr. Indictment, misdemeanor.

26 In the Court of Quarter Sessions of Allegheny County. March Sessions, 1887.

COMMONWEALTH OF PENNSYLVANIA
vs.
HAY WALKER, Jr., JOHN H. WILSON, EMIL WINTER, and HARVEY WILSON. } No. 398.

To the honorable the chief justice and the justices of the supreme court of Pennsylvania:

The petition of Hay Walker, Jr., John H. Wilson, Emil Winter, and Harvey Wilson, who are citizens and merchants of the county of Allegheny, in the State of Pennsylvania, respectfully represents:

On May 21st, 1885, an act of Assembly was approved, entitled "An act for the protection of the public health and to prevent adulteration of dairy products and fraud in the sale thereof." (P. L., 1885, page 22.)

This act made the manufacture or the sale of any oleaginous substance or any compound of the same other than that produced from unadulterated milk or of cream from the same or of any article designed to take the place of butter and cheese produced from pure, unadulterated milk or cream from the same, or of any imitation of unadulterated butter or cheese a misdemeanor *or* punishable by fine or by fine and imprisonment.

27 On the 2nd day of February, A. D. 1887, your petitioners, in Allegheny county, Pennsylvania, sold to S. J. Adamson, the prosecuting witness in this case, as an article of food, one original package of an article manufactured in the said county of Allegheny by the defendants out of oleaginous substances and compounds other than that produced from unadulterated milk or cream from the same and designed to take the place of butter produced from unadulterated milk or cream. This package was sold and bought as oleomargarine or butterine, and not as butter produced from pure, unadulterated milk or cream from the same.

The said defendants had this package in their possession with intent to sell it as an article of food. The package when sold was marked with the words "oleomargarine butter" upon the lid and side of the package in a straight line in Roman letters one-half an inch long, as provided in the act of the General Assembly of this State entitled "An act for the protection of dairymen and to prevent deception in sales of butter and cheese," approved May 24th, 1883.

For such sale, and having in their possession with intent to sell the same, your petitioners were arrested and the case returned to court, and the grand jury found against your petitioners a true bill.

Your petitioners having pleaded not guilty to the true bill, the case came on for trial on the 12th day of May, 1887, and on the trial thereof your petitioners made various offers of evidence,

28 all of which are shown in the record herewith presented, and all of which offers were refused and bills of exceptions sealed.

That your petitioners defended against said prosecutions also on the ground that the said act of Assembly was unconstitutional, in that it came in conflict with the provisions of the fourteenth amendment of the Federal Constitution, among other things, in this, that it denied to the defendants the equal protection of the laws of the State of Pennsylvania; that it deprived the defendants of their liberty without due process of law; that it deprived the defendants of their property without due process of law, and also that the act was in conflict with the constitution of the State of Pennsylvania. The court refused all these points, and your petitioners, having been found guilty, on May 12th, 1887, were sentenced to pay a fine of one hundred dollars to the Commonwealth and the costs of the prosecution.

Your petitioners herewith present a full and certified copy of the record of the said case, and show to your honors that error was committed in the said case in the rejection of the several offers of evidence therein made, and also in the refusal to affirm the different points presented by your petitioners, and also in holding that the said act of Assembly, under which your petitioners were indicted, was not in conflict with the fourteenth amendment to the Federal Constitution.

Your petitioners, therefore, respectfully pray your honors to
29 grant an allocatur in order to permit a review by your honorable court of the proceedings against them in this case in the court of quarter sessions of the county of Allegheny.

HAY WALKER, JR.
JOHN H. WILSON.
EMIL WINTER.
HARVEY WILSON.

STATE OF PENNSYLVANIA, *County of Allegheny:*

Personally before me came Hay Walker, one of the petitioners, who, being by me duly sworn according to law, deposes and says that the statements contained in the foregoing petition are correct and true.

HAY WALKER, JR.

Sworn and subscribed before me this 8th day of June, A. D. 1887.
[SEAL.] L. H. MATHEWS,
Notary Public.

29½ March Sessions, 1887.

COM'N'TH *vs.* WALKER *et al.* } No. 398.

And now, June 9, 1887, writ of error allowed and ordered to be issued on the def'd'ts filing a bond, with security, to be approved by one of the judges of the court of quarter sessions of the county of Allegheny, in the sum of $500, conditioned for the appearance of def'd'ts at the first term of court after judgment entered on said writ of error and not to depart said court without leave, &c.; and on the approval of the said bond all proceedings in the court of quarter sessions of Allegheny county *and* stayed.

SILAS M. CLARK,
Justice of Supreme C't.

30 In the Court of Quarter Sessions of Allegheny County, of March Sessions, 1887.

COMMONWEALTH OF PENNSYLVANIA
vs.
HAY WALKER, Jr., JOHN H. WILSON, EMIL WINTER, and HARVEY WILSON. } No. 398.

We and each of us, M. T. Sullivan, Paul Dunlevy, and Hay Walker, Jr., do acknowledge ourselves jointly and severally indebted to the Commonwealth of Pennsylvania in the sum of five hundred dollars, to be levied of our and each of our lands and tenements, goods and chattels.

Whereas the above-named Hay Walker, Jr., John H. Wilson, and Harvey Wilson, in pursuance of allowance of said court obtained on June 9th, 1887, have taken out a writ of error in said entitled case to the supreme court of Pennsylvania:

Now, the condition of this bond is such that if the said named Hay Walker, Jr., John H. Wilson, Emil Winter, Harvey Wilson shall be and appear at the first term of the said court of quarter sessions of Allegheny county after judgment entered on said writ of error and shall not depart said court without leave, then this
31 obligation to be void; otherwise to remain in full force and virtue.

Witness our hands and seals this 10th day of June, 1887.

HAY WALKER, JR. [SEAL.]
M. J. SULLIVAN. [SEAL.]
PAUL DUNLEVY. [SEAL.]

In the presence of—
A. P. BURGWIN.

STATE OF PENNSYLVANIA, } ss:
County of Allegheny, }

Personally before me, a notary public within and for said county and State, came the within-named Hay Walker, Jr., M. J. Sullivan, and Paul Dunlevy, who, being by me duly sworn according to law, do*th* depose and say that they and each of them are worth the sum of five hundred dollars over and above all their just debts and liabilities, and that each of them owns real estate over and above the value of five hundred dollars and free of all encumbrance.

HAY WALKER, JR.
M. J. SULLIVAN.
PAUL DUNLEVY.

Sworn to and subscribed this 11th day of June, A. D. 1887.
[CORAM SEAL.] L. H. MATTHEWS,
Notary Public.

32 And now, to wit, June 11th, 1887, the above and foregoing bond having been presented to me, is hereby approved.

By the court:

Per F. H. COLLIER, *Judge.*

Attest: [SEAL.] D. K. McGUNNEGLE,
Clerk of Courts.

[Endorsed:] No. 398. Of March sessions, 1887. Commonwealth of Pa. *v.* Hay Walker, Jr., *et al.* Recognizance. Filed June 11, '87.

33 THE COMMONWEALTH OF PENNSYLVANIA, } *sct:*
Western District of Pennsylvania, }

To the judges of the court of quarter sessions for the county of Allegheny, Greeting:

Because in the record and process and in rendering the judgment in a certain plaint which was in our said court before the judges of the same court, by our writ, between The Com'n'th of Penn'a, pl'ff, & Hay Walker, Jr., John H. Wilson, George Hasley, Emil Winter, & Harvey Wilson, d'f'ts, at No. 398, of March sessions, 1887, as it is said, manifest error hath intervened, to the great damage of the said pl'ff, as by complaint of the same pl'ffs we have received information, we, willing that if any error be therein it should be corrected and that speedy justice be done to the parties in this part, do command you that if judgment, as it is said, be rendered in said plea, then the record and process and all things touching the same, under your seal, distinctly and openly, you have before the judges of the supreme court of the said Commonwealth, at a supreme court to be held at Pittsburgh, in and for the western district of the said Commonwealth, on the first Monday of October next, and this writ, that, the record and process aforesaid being inspected, we may further cause to be done what of right and according to our customs ought.

Witness the Honorable Ulysses Mercur, LL. D., chief justice of our said supreme court, at Pittsburgh, the 11 day of June, in the year of our Lord one thousand eight hundred and 87, and of the Commonwealth the 111.

June 9, 1887.

J. B. SWEITZER,
Prothonotary of Western District.

Allowed by—
CLARK, *J.*

34 [Endorsed:] No. 398. March term, 1887. No. 143. Of Oct. and Nov. term, 1882. Supreme court. Hay Walker, Jr., *et al.* pl'ffs in E., d'f't- below, *vs.* The Com'n'th of Pa. Writ of error to the quar. sess'ns Allegheny Co. Returnable to first Monday of July, 1887, Philad. Precipe, affidavit, and recognizance filed and writ issued June, 1887. "Rule to appear and plead at return of writ." Re*d't* June 17, '87. N. B.—12 days' notice to the part- or —counsel below is necessary to compel an appearance. J. B. Sweitzer, pro. W. D.

Bond in the sum of $500, approved by Judge Collier, filed. $6. D. T. W., p. W. B. Rodgers, D. T. Watson, att'ys for P. in E. Filed June 11th, 1887.

COMMONWEALTH OF PENNSYLVANIA, } ss:
County of Allegheny, }

To the honorable the judges of the supreme court:

The record and process within mentioned, with all things touching the same, before the judges within named at the day and place within contained in a certain record to this writ annexed, we do certify and send as within we are commanded.

THOS. EWING, *P. J.* [SEAL.]

35 At a supreme court of the State of Pennsylvania sitting in and for the western district of said State, at the city of Pittsburgh, Pennsylvania, on the 12th day of November, 1887:

Present: The Honorable Isaac G. Gordon, chief justice, Edward M. Paxson, James B. Sterritt, Henry Green, and H. W. Williams, justices, and J. B. Sweitzer, Esq., prothonotary, of said court.

Among the records of the said supreme court of Pennsylvania in and for the western district, to October term, 1887, No. 143, it is contained as follows, to wit:

36 *Writ of Error to the Court of Quarter Sessions of Allegheny County, at No. 398, M'ch T., 1887.*

Supreme Court of Pennsylvania in and for the Western District. October Term, 1887.

M. B. RODGERS, D. T. WATSON, HAY WALKER, Jr., *et al.*, P's in E., D'f'd'ts Below,
vs.
W. D. PORTER, COMMONWEALTH OF PA. } No. 143.

Precipe and affidavit and recognizance filed and writ issued, rule, &c., June 11, '87.

Record returned Oct. 19, '87.

Errors assigned " "

Submitted Oct. 27, '87.

Nov. 7, '87, judgment affirmed *per curiam.*

Costs:

Writ, D. T. W., p'd	$6 00
Att'y for D. in E.	4 00
Pro. S.	8 00
Total	$

Nov. 12, '87, D. T. Watson p'd pro. S. $8 & took rec'ds.

Copy of record, $24, p. by D. T. Watson, Esq. S.

Nov. 12, 1887, writ of error & copy & bond approved by Bradley, J., and citation with proof of service filed Nov. 14, '87, & record sent up.

Witness my hand and the seal of said court.
Nov. 14, 1887.

[Seal of the Supreme Court of Pennsylvania, Western District, 1776.]

J. B. SWEITZER,
Prothonotary.

[Endorsed:] No. 143. October term, 1887. Supreme court of Pennsylvania, western district. Hay Walker, Jr., *et al. vs.* Commonwealth.

37 *Assignments of Error.*

The court erred in sustaining the objections to and overruling an offer of defendant, which offer and the answer thereto is as follows:

1st. The defendants now offer to prove that prior to the 21st day of May, A. D. 1885, and on the 10th day of May, 1881, they were and they ever since have been and still are citizens of the State of Pennsylvania, residing within the county of Allegheny, in said State, and that on May 10th, 1881, they associated themselves as a voluntary partnership organization (authorized by the laws of the State of Pennsylvania), under the name of the Pittsburgh Melting Company, for the purpose of the manufacture and sale of oleomargarine or butterine, it being an article manufactured out of oleaginous substances and compounds other than that produced from unadulterated milk or cream from the same and designed to take the place of butter produced from unadulterated milk or cream; that on the 10th day of May, 1881, and prior thereto there was no statute or law in the State of Pennsylvania prohibiting such manufacture and sale; but, on the contrary thereof, there was in force an act of the General Assembly of the State of Pennsylvania, entitled "An act to prevent deception in the sale of butter and cheese," approved May 22nd, 1878, and that subsequent thereto the General Assembly of this State passed and the Governor approved an act entitled An act for the protection of dairymen and to prevent deception in the sale of butter and cheese, the said act being approved May
38 24th, 1883, and with this offer the defendant offers in evidence each of the said acts:

That for the purpose of the manufacture of the said oleomargarine and butterine the said defendants, under the name of the Pittsburgh Melting Company, purchased a large quantity of machinery in the years 1881, 1882, and 1883 especially made for and adapted to the manufacture of the said oleomargarine or butterine and erected the said machinery in a building for that purpose, and prior to the 1st day of January, A. D. 1885, the said defendants, under the name of the Pittsburgh Melting Company, had invested in said machinery a sum of money exceeding $20,000, of which sum the defendant, Hay Walker, contributed ($10,000) ten thousand dollars.

That the said defendants continued to manufacture with the said machinery said oleomargarine or butterine and to sell said manufactured product up — and until and including the 21st day of May, 1885, at which time an act was passed by the General Assembly of

the State of Pennsylvania and approved by the Governor of said State, entitled "An act for the protection of the public health and to prevent adulteration of dairy products and fraud in the sale thereof," which act the defendants offer in evidence, it being the same act under which the indictment in this case is found.

That after the passage and approval of the said act of May 21st, 1885, the said defendants continued, just as before its passage, to manufacture, by the use of the said machinery but not otherwise, said oleomargarine or butterine and to sell the same, and the identical package of oleomargarine or butterine which was sold to the prosecuting witness was manufactured by the said defendants subsequent to the 21st day of May, 1885, but solely by the use of the said machinery purchased, as aforesaid, prior to said 21st day of May, 1885.

39

That said defendants in the carrying on of their said business and in the manufacture of the said oleomargarine or butterine, and in the manufacture of the identical package of oleomargarine or butterine hereinbefore specified, which was sold to the prosecuting witness in this case, used only pure animal fat; that the process of its manufacture was clean and wholesome; that the articles manufactured contained the same elements as pure butter; that the only difference between them is that the manufactured article contains a smaller proportion of a fatty substance which is known as butterine; that this butterine exists in pure butter in the proportion of from three to seven per cent. and in the manufactured article in a smaller proportion, and this was increased in the manufactured article by the introduction of milk and cream.

That this having been done, the article sold and manufactured contains all the elements of pure butter produced from pure, unadulterated milk or cream from the same, except that the percentage of butterine is slightly smaller; that the only effect of butterine is to give flavor to the butter and it has nothing to do with its wholesomeness; that the oleaginous substances in the manufactured article are substantially identical with those produced from milk or cream, and that the article manufactured and sold by the defendants to the prosecuting witness is a wholesome and nutritious article of food made, as hereinbefore stated, by the use of machinery and appliances purchased and owned by said defendants prior to the 21st day of May, 1885, and that the said butterine or oleomargine as manufactured and sold to the prosecuting witness was in all respects as wholesome and healthful as butter produced from pure, unadulterated milk or cream from the same.

40

That the said act of May 21st, 1885, prevents the said defendants from using the said machinery as aforesaid for the manufacture of oleomargarine or butterine, and that by such deprivation the said machinery is much depreciated in value and rendered almost useless, and instead of being worth the sum of $20,000, as it would be if used for the said purposes for which it was made or used, it is rendered of much less value, being worth only the sum of $5,000.

That prior to the said 21st day of May, 1885, and on the 10th day of May, 1881, the said defendants expended considerable sums of

money and went to great labor to fit themselves for the pursuit of the calling of the manufacture and sale of oleomargarine or butterine, and that they then (May 10th, 1881) adopted the manufacture and sale of said oleomargarine and butterine as their occupation or calling in life and continued from thence up until after the passage of the said act of May 21st, 1885, in the pursuit of their calling and occupation in life and made therefrom large gains and profits,
41 and that in the manufacture of the said oleomargarine or butterine during all said time, the process of manufacture, the articles out of which it was manufactured, and the oleomargarine and butterine manufactured and sold was as hereinbefore stated.

That there was neither deceit nor fraud practiced in either the manufacture or sale of any of the oleomargarine nor was it an adulterated product.

That the said act of May 31st, 1885, in prohibiting the manufacture or sale of the said oleomargarine or butterine, deprives the defendants of the gains and profits they had made in their calling and occupation and in the manufacture and sale of the said oleomargarine and butterine, besides rendering of much less value the machinery in which the said defendants invested as aforesaid, and depriving the defendants of their calling or occupation in life.

And this for the purpose of showing (1st) that the manufacture and sale of oleomargarine or butterine for which the defendants are indicted in no way injuriously affects the health, morals, peace, or the good order of society or of any citizen or resident of the State of Pennsylvania, and that the said oleomargarine or butterine manufactured and sold is not an adulteration of a dairy product nor is it an adulterated article.

(2nd) That the said act of May 21st, 1885, is not an exercise of or within the police power of the State of Pennsylvania.

42 (3rd) That the said act of May, 21st, 1885, is in conflict with and repugnant to the Constitution of the United States, in that (*a*) it deprives the defendants of their liberty without due process of law, (*b*) in that it deprives the defendants of their property without due process of law, and (*c*) in that it denies to the defendants the equal protection of the laws of the State of Pennsylvania.

(4th) That the said act is in conflict with and repugnant to the provisions of the constitution of the State of Pennsylvania, in that it takes from the defendants their calling and property without due process of law and without compensation, and also in that it strikes down one industry (that of the manufacture and sale of oleomargarine) to benefit another industry (that of the manufacture and sale of butter produced from milk or cream).

Counsel for the Commonwealth object to the evidence offered by defendants upon the following grounds:

1st. The evidence is not material.

2nd. It is not relevant.

3rd. Even if the facts set forth in the offer were established by proof they would not constitute a legal defence.

Answer.

The recent case of Powell *vs.* The Commonwealth, decided by the supreme court of Pennsylvania in January of this year, in our opinion decides the questions raised by this offer and is binding on us.

43 The objections to defendants' offer are sustained. The evidence is excluded.

To which ruling of the court counsel for defendants except, and thereupon bill sealed for defendant's.

THOS. EWING. [SEAL.]

2nd. The court erred in sustaining the objections to and overruling an offer of defendant, which offer and the answer thereto is as follows:

The defendants' counsel now offer to prove that on and prior to the 21st day of May, 1885, their occupation or calling in life was the manufacture and sale of oleomargarine or butterine in Allegheny county, Pennsylvania, and that prior to May 21st, 1885, and in said county in order to fit and prepare themselves for such occupation or calling they had expended considerable sums of money and gone to great labor.

That in pursuance of their occupation and calling in life the defendants did, after May 21st, 1885, manufacture and sell to the prosecuting witness the package of oleomargarine, and that said oleomargarine was made solely from pure animal fats, and the process of its manufacture was clean and wholesome, and that said oleomargarine is a wholesome and nutritious article of food, and in all respects as wholesome and healthful as pure butter produced from pure, unadulterated milk or cream from the same; that there

44 was no fraud or deception in either the manufacture or sale of said oleomargarine, and that said oleomargarine was not an adulterated product.

This, for the purpose of showing—

(1st.) That by the said act of May 21st, 1885, the defendants are deprived of their liberty and property without due process of law.

(2nd.) That by the said act of May 21st, 1885, the defendants are denied the equal protection of the laws of the State of Pennsylvania.

(3rd.) That the said act of May 21st, 1885, is repugnant to the provisions of the 14th amendment to the Constitution of the United States.

(4th.) That the said act of May 21st, 1885, is not an exercise of or within the police powers of the State of Pennsylvania.

(5th.) That the said act of May 21st, 1885, is in conflict with and repugnant to the provisions of the constitution of the State of Pennsylvania.

Counsel for the Commonwealth object to the evidence offered for the reason that it is not relevant and it is not material. The act forbids the manufacture and sale of the article, and it is not material to the inquiry in this case whether it was sold openly or not, nor whether it was pure or adulterated.

Answer.

The objections are sustained. The testimony offered is excluded.

45 And thereupon bill sealed for defendants.

THOS. EWING. [SEAL.]

3rd. The defendants propose to prove by M. J. Sullivan that he saw the article sold to the prosecuting witness manufactured by defendants; that it was made from pure animal fats; that the process of manufacture was clean and wholesome; that the article contains the same elements as dairy butter; that the only difference between them is that the manufactured article contains a smaller proportion of the fatty substance known as butterine; that this butterine exists in dairy butter in the proportion of from three to seven per cent. and in the manufactured article in a smaller proportion, and was increased in the manufactured article by the introduction of milk and cream; that this having been done the article contains all the elements of butter produced from pure, unadulterated milk or cream from the same, except that the percentage of butterine is slightly smaller; that the only effect of butterine is to give flavor to the butter and has nothing to do with its wholesomeness; that the oleaginous substance in the manufactured article are substantially identical with those produced from milk or cream; that the article sold by the defendants to the prosecutor was a wholesome and nutritious article of food, and in all respects as wholesome and healthful as butter produced from pure, unadulterated milk or cream from the same.

46 This, for the purpose of showing—

(1st.) That the said act of May 21st, 1885, is not within or an exercise of the police powers of the State of Pennsylvania.

(2nd.) That the said act of May 21st, 1885, is repugnant to and in conflict with the provisions of the fourteenth (14th) amendment to the Constitution of the United States.

(3rd.) That the said act of May 21st, 1885, deprives the defendant of his property and liberty without due process of law, and denies to him the equal protection of the laws of the State of Pennsylvania.

(4th.) That said act of May 21st, 1885, is in conflict with the constitution of the State of Pennsylvania, in that it deprives him of his liberty or property without due process of law and without compensation.

Counsel for the Commonwealth object to the evidence for the reason that it is irrelevant and immaterial, and the evidence if true would not go to constitute a defence.

Answer.

The objections are sustained and bill sealed for the defendants.

THOS. EWING. [SEAL.]

47 4th. The court erred in refusing to affirm the following point, which point and the answer thereto is as follows:

(1st.) That the act of the General Assembly of the Commonwealth of Pennsylvania entitled "An act for the protection of the public health and to prevent the adulteration of dairy products and fraud in the sale thereof," approved May 21st, 1885, is repugnant to the provisions of the 14th amendment of the Constitution of the United States, in that it did and does deny to the defendants, persons within the jurisdiction of the State of Pennsylvania, the equal protection of the laws of the State of Pennsylvania.

Answer.

These questions having been passed on by the supreme court of the State and decided adversely to the contention of the defendants, they are refused.

Counsel for defendants except, and thereupon bill sealed for defendants.

THOS. EWING. [SEAL.]

5th. The court erred in refusing to affirm the following point, which point and the answer thereto is as follows:

(2nd.) That the act of the General Assembly of the Commonwealth of Pennsylvania entitled "An act for the protection of the public health and to prevent the adulteration of dairy products and fraud in the sale thereof," approved May 21st, 1885, is repugnant to the provisions of the 14th amendment of the Constitution of the United States, in that it did and does deprive the defendants of their

48 liberty without due process of law.

Answer.

These questions having been passed on by the supreme court of the State and decided adversely to the contention of the defendants, they are refused.

Counsel for defendants except, and thereupon bill sealed for defendants.

THOS. EWING. [SEAL.]

6th. The court erred in refusing to affirm the following point, which point and the answer thereto is as follows:

(3rd.) That the act of the General Assembly of the Commonwealth of Pennsylvania entitled "An act for the protection of the public health and to prevent the adulteration of dairy products and fraud in the sale thereof," approved May 21st, 1885, is repugnant to the provisions of the 14th amendment to the Constitution of the United States, in that it did and does deprive the defendants of their property without due process of law.

Answer.

These questions having been passed on by the supreme court of the State and decided adversely to the contention of the defendants, they are refused.

Counsel for defendants except, and thereupon bill sealed for defendants.

THOS. EWING. [SEAL.]

7th. The court erred in refusing to affirm the following point, which point and the answer thereto is as follows:

49 (4th.) That the said act of the General Assembly, approved May 21st, 1885, is not an exercise of nor is it within the police powers of the State of Pennsylvania.

Answer.

These questions having been passed on by the supreme court of the State and decided adversely to the contention of the defendants, they are refused.

Counsel for defendants except, and thereupon bill sealed for defendants.

THOS. EWING. [SEAL.]

8th. The court erred in refusing to affirm the following point, which point and the answer thereto is as follows:

(5th.) That the said act of the General Assembly, approved May 21st, 1885, is repugnant to the provisions of the constitution of the State of Pennsylvania in that it deprives the defendants of their liberty and property without due process of law and without compensation.

Answer.

These questions having been passed on by the supreme court of the State and decided adversely to the contention of the defendants, they are refused.

Counsel for defendants except, and thereupon bill sealed for defendants.

THOS. EWING. [SEAL.]

50 9th. The court erred in refusing to affirm the following point, which point and the answer thereto is as follows:

(6th.) That under the constitution of the State of Pennsylvania such class legislation in favor of one industry (dairy products) at the expense of another (oleomargarine) is illegal and void.

Answer.

These questions having been passed on by the supreme court of the State and decided adversely to the contention of the defendants, they are refused.

Counsel for defendants except, and thereupon bill sealed for defendants.

THOS. EWING. [SEAL.]

51 [Endorsed:] No. 143. Octo. & Nov. term, 1887. Henry Walker, Jr., *et al. vs.* Commonwealth of Penna. Assignments of error. Filed Oct. 19, '87.

52 In the Supreme Court of Pennsylvania, Western District. Oct. T., 1887.

HAY WALKER *et al.*
vs.
THE COMMONWEALTH. } No. 143.

Error to the court of quarter sessions of the county of Allegheny. Submitted Oct. 27, 1887.

Per curiam:

This case is ruled by Powell *vs.* The Commonwealth, 19 W. N. C., 24, so far as the question of the police power of the State is concerned. We were of opinion there, as we are now, that the Legislature has the power to prohibit the manufacture and sale of an article detrimental to the public health. Whether oleomargarine was such an article was a question of fact, and one which had been determined by the Legislature. We are bound to presume that it was done upon sufficient evidence.

52½ The question now presented by the defendants' first and second points (see 4th and 5th assignments) was not directly made in the court below upon the trial of Powell *vs.* The Commonwealth and was not pressed upon our attention. We affirm this case *pro forma* in order that both may go up together.

Judgment affirmed.

(2.)

WESTERN DISTRICT, *ss:*

I, J. B. Sweitzer, pro. supreme court of Pennsylvania, do hereby certify that the above, printed on two (2) pages, is a true copy of opinion of said court in Walker *et al. vs.* The Commonwealth, 143, Oct. term, 1887, as the same is now on file in my office.

Witness my hand & seal of said court this 12 day of Nov., A. D. 1887.

[Seal of the Supreme Court of Pennsylvania.]

J. B. SWEITZER,
Pro. S. C., W. D.

53 Know all men by these presents that we, Hay Walker, Jr., John H. Wilson, Emil Winter, and Harvey Wilson and George Hasley, all of the county of Allegheny, in the State of Pennsylvania, and S. P. Harbison and Hepburn Walker, all of the said county of Allegheny and State aforesaid, are held and firmly bound unto the Commonwealth of Pennsylvania and its assigns in the full sum of one thousand ($1,000) dollars, to be paid to the said Com-

monwealth, its certain attorneys or assigns; to which payment, well and truly to be made, we do bind ourselves, our heirs, executors, and administrators, and every of them, jointly and severally, firmly by these presents.

Sealed with our seals and dated this — day of November, A. D. 1887.

Whereas lately at a session of the supreme court of the State of Pennsylvania, in a suit depending in said court between Hay Walker, Jr., John H. Wilson, Emil Winter, and Harvey Wilson and George Hasley, plaintiffs in error and defendants in the court of quarter sessions of the county of Allegheny, and the Commonwealth of Pennsylvania, defendant in error in said supreme court of Pennsylvania, and the prosecutor in the court of quarter sessions of Allegheny county, a judgment was rendered against the said Hay Walker, Jr., John H. Wilson, Emil Winter, and Harvey Wilson and George Hasley by the said supreme court of Pennsylvania in favor of the said Commonwealth of Pennsylvania; and the said Hay Walker, John H. Wilson, Emil Winter, and Harvey Wilson and George Hasley, plaintiffs in error as aforesaid in said case,
54 have obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Commonwealth of Pennsylvania citing and admonishing it to be and appear at the Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said Hay Walker, Jr., John H. Wilson, Emil Winter, and Harvey Wilson and George Hasley shall prosecute their writ of error with effect and answer all damages and costs if they fail to make this plea good, then the above obligation to be void; else to remain in full force and virtue.

HAY WALKER, JR. [SEAL.]
JOHN H. WILSON. [SEAL.]
EMIL WINTER. [SEAL.]
HARVEY WILSON. [SEAL.]
GEORGE HASLEY. [SEAL.]
S. P. HARBISON. [SEAL.]
HEPBURN WALKER. [SEAL.]

Signed, sealed, and delivered in presence of—
S. C. McCANDLESS,
As to signatures of S. P. Harbison and Hepburn Walker, Hay Walker, Jr., Emil Winter, Harvey Wilson, and George Hasley.

Personally before me came S. P. Harbison and Hepburn Walker, who, being duly sworn, say that each of us is worth, over and above all debts and liabilities, much more than the sum of one thousand ($1,000) dollars.

S. P. HARBISON.
HEPBURN WALKER.

Sworn and subscribed before me this 8th day of November, 1887.
[SEAL.] S. C. McCANDLESS,
U. S. Commissioner, W. D. of Pennsylvania.

I believe the within bond to be good and I have no objection to the sureties thereon.
Nov. 10th, 1887.
W. D. PORTER,
District Attorney of Allegheny County, Pennsylvania, Att'y for Defendant in Error.

The foregoing bond is approved.
Nov. 11, 1887.
JOSEPH P. BRADLEY,
Asso. Justice of Sup. C't U. S.

55 In the Supreme Court of the United States. October Term, 1887.

HAY WALKER, Jr., JOHN H. WILSON, EMIL WINTER, and Harvey Wilson and George Hasley, Plaintiffs in Error, but Defendants below,
vs.
THE COMMONWEALTH OF PENNSYLVANIA. } No. —.

To the Honorable Joseph P. Bradley, one of the justices of the Supreme Court of the United States:

The petition of Hay Walker, Jr., John H. Wilson, Emil Winter, and Harvey Wilson and George Hasley respectfully shows—

That they were indicted at the instance of the Commonwealth of Pennsylvania, in the quarter sessions of the county of Allegheny, in the State of Pennsylvania, on the 27th day of April, 1887, at No. 398, March sessions, 1887, of the said court, under the provisions of an act of the General Assembly of the State of Pennsylvania entitled "An act for the protection of the public health and to prevent adulteration of dairy products and fraud in the sale thereof," approved the 21st day of May, 1885; and in said indictment they were charged *inter alia* with the manufacture and sale of oleomargarine in the following words: "Did then and there manufacture out of a certain oleaginous substance other than that produced from unadulterated milk and of cream from the same large quantities
56 of a certain article designed to take the place of butter produced from pure, unadulterated milk and of cream from the same, contrary to the form of the act of the General Assembly in such case made and provided."

Your petitioners pleaded not guilty, and a jury was sworn in the cause on the 12th day of May, 1887; that on the trial of the said cause your petitioners set up and claimed that the said statute was repugnant to the provisions of the Constitution of the United States in the following, among other, particulars:

(I.) In that it denies your petitioners, persons within the jurisdiction of the State of Pennsylvania, the equal protection of the laws of the State of Pennsylvania.

(II.) In that it deprives the petitioners of their liberty without due process of law.

(III.) In that it deprives the petitioners of their property without due process of law, and that therefore the said act is repugnant to the 14th amendment of the Constitution of the United States.

That the decision of the trial court was against the rights, privileges, and immunities set up and claimed by your petitioners under the Constitution of the United States, as hereinbefore specified.

That your petitioners were, under the charge of the court and on May 12th, 1887, found guilty and sentenced to pay a fine of one hundred ($100) dollars and the costs of prosecution.

That to the judgment and sentence so entered a writ of error
57 was sued out to the supreme court of the State, and that afterwards, and on the 7th day of November, 1887, the supreme court of the State of Pennsylvania, being the highest court of the State in which a decision in said suit could be had, affirmed the judgment and sentence of the court below, and this notwithstanding that your petitioners again set up and claimed their privileges and immunities under the 14th amendment of the Federal Constitution, and that the said act of the General Assembly of the State of Pennsylvania was in contravention of the said 14th amendment, the same as they had done in the trial court.

Your petitioners further herewith present a certified copy of the record in said cause, including a bond given in the supreme court of the State of Pennsylvania in said cause by your petitioners when the writ of error was issued, and they further show unto your honors that the offense with which they are charged is bailable under the laws of the State of Pennsylvania, and that they are not in custody under the judgment and sentence of the State court.

Your petitioners humbly complain*iny* unto your honors that the said rulings and decisions of the supreme court of the State of Pennsylvania, and in the trial court thereof, as hereinbefore set out, and as shown by the said record herewith presented, were erroneous and void, and that said statute of the State of Pennsylvania under which your petitioners were convicted and sentenced is repugnant to the provisions of the 14th amendment of the Constitution of the United States.

58 Wherefore they pray your honors will allow and grant unto them a writ of error from the Supreme Court of the United States to the supreme court of the State of Pennsylvania in said case, and such other and further relief as may be appropriate.

And they will ever pray, &c.

HAY WALKER, JR.
JOHN H. WILSON.
EMIL WINTER.
HARVEY WILSON.
GEO. HASLEY.

STATE OF PENNSYLVANIA, } ss:
County of Allegheny, }

Personally before me came Hay Walker, Jr., Emil Winter, Harvey Winter, and George Hasley, who, being by me duly sworn, say that the statements contained in the foregoing petition are correct and true, as *he* verily believe.

HAY WALKER, JR.
EMIL WINTER.
HARVEY WILSON.
GEO. HASLEY.

Sworn and subscribed before me this 8th day of November, 1887.

{Seal S. C. McCandless, U. S. Commissioner, West. Dist. of Pa.}

S. C. McCANDLESS,
U. S. Commissioner, Western District of Pa.

58½ The writ of error within prayed for is allowed Nov. 11th 1887.

JOSEPH P. BRADLEY,
Asso. Justice of Sup. C't U. S.

59 And now, November 12th, 1887, come Hay Walker, Jr., John H. Wilson, Emil Winter, Harvey Wilson, and George Hasley, plaintiffs in error, and humbly pray the honorable the Chief Justice and associate justices of the Supreme Court of the United States to reverse the judgment of the supreme court of Pennsylvania for manifold errors committed in this cause, which errors are as follows:

60 *Assignment of Error.*

In the Supreme Court of the United States. October Term, 1888.

HAY WALKER, Jr., JOHN H. WILSON, EMIL WINTER, HARVEY WILSON, and GEORGE HASLEY, Plaintiffs in Error,
vs.
THE COMMONWEALTH OF PENNSYLVANIA, Defendant in Error. } No. —.

The court erred in sustaining the objections to and overruling an offer of defendant, which offer and the answer thereto is as follows:

1st. The defendants now offer to prove that prior to the 21st day of May, A. D. 1885, and on the 10th day of May, 1881, they were and they ever since have been and still are citizens of the State of Pennsylvania, residing within the county of Allegheny, in said State, and that on May 10th, 1881, they associated themselves as a voluntary partnership organization (authorized by the laws of the State of Pennsylvania) under the name of The Pittsburgh Melting Company, for the purpose of the manufacture and sale of oleomar-

garine or butterine, it being an article manufactured out of oleaginous substances and compounds other than that produced from unadulterated milk or cream from the same, and designed to take the place of butter produced from unadulterated milk or cream; that on the 10th day of May, 1881, and prior thereto, there was no statute or law in the State of Pennsylvania prohibiting such manufacture
61 and sale, but, on the contrary thereof, there was in force an act of the General Assembly of the State of Pennsylvania, entitled "An act to prevent deception in the sale of butter and cheese," approved May 22nd, 1878, and that subsequent thereto the General Assembly of this State passed and the Governor approved an act entitled "An act for the protection of dairymen and to prevent deception in the sale of butter and cheese," the said act being approved May 24th, 1883, and with this offer the defendant offers in evidence each of the said acts.

That for the purpose of the manufacture of the said oleomargarine and butterine the said defendants, under the name of the Pittsburgh Melting Company, purchased a large quantity of machinery in the years 1881, 1882, and 1883, especially made for and adapted to the manufacture of the said oleomargarine or butterine, and erected the said machinery in a building for that purpose, and prior to the 1st day of January, A. D. 1885, the said defendants, under the name of the Pittsburgh Melting Company, had invested in said machinery a sum of money exceeding $20,000, of which sum the defendant, Hay Walker, contributed ($10,000) ten thousand dollars.

That the said defendants continued to manufacture with the said machinery said oleomargarine or butterine and to sell said manufactured product up and until and including the 21st day of May, 1885, at which time an act was passed by the General Assembly of the State of Pennsylvania and approved by the Governor of said State entitled "An act for the protection of the public health
62 and to prevent adulteration of dairy products and fraud in the sale thereof," which act the defendants offer in evidence, it being the same act under which the indictment in this case is found.

That after the passage and approval of the said act of May 21st, 1885, the said defendants continued just as before its passage to manufacture by the use of the said machinery, but not otherwise, said oleomargarine or butterine and to sell the same, and the identical package of oleomargarine or butterine which was sold to the prosecuting witness was manufactured by the said defendants subsequent to the 21st day of May, 1885, but solely by the use of the said machinery purchased as aforesaid prior to said 21st day of May, 1885.

That said defendants in the carrying on of their said business and in the manufacture of the said oleomargarine or butterine and in the manufacture of the identical package of oleomargarine or butterine hereinbefore specified which was sold to the prosecuting witness in this case used only pure animal fats; that the process of its manufacture was clean and wholesome; that the articles manu-

factured contained the same elements as pure butter; that the only difference between them is that the manufactured article contains a smaller proportion of a fatty substance, which is known as butterine; that this butterine exists in pure butter in the proportion of from three to seven per cent. and in the manufactured article in a smaller proportion, and this was increased in the manufactured article by the introduction of milk and cream.

63 That this having been done the article sold and manufactured contains all the elements of pure butter produced from pure unadulterated milk or cream from the same, except that the percentage of butterine is slightly smaller; that the only effect of butterine is to give flavor to the butter, and it has nothing to do with its wholesomeness; that the oleaginous substances in the manufactured article are substantially identical with those produced from milk or cream, and that the article manufactured and sold by the defendants to the prosecuting witness is a wholesome and nutritious article of food made as hereinbefore stated by the use of machiney and appliances purchased and owned by said defendants prior to the 21st day of May, 1885, and that the said butterine or oleomargarine as manufactured and sold to the prosecuting witness was in all respects as wholesome and healthful as butter produced from pure, unadulterated milk or cream from the same.

That the said act of May 21st, 1885, prevents the said defendants from using the said machinery as aforesaid for the manufacture of oleomargarine or butterine, and that by such deprivation the said machinery is much depreciated in value and rendered almost useless, and instead of being worth the sum of $20,000, as it would be if used for the said purposes for which it was made or used, it is rendered of much less value, being worth only the sum of $5,000.

64 That prior to the said 21st day of May, 1885, and on the 10th day of May, 1881, the said defendants expended considerable sums of money and went to great labor to fit themselves for the pursuit of the calling of the manufacture and sale of oleomargarine or butterine, and that they then (May 10th, 1881) adopted the manufacture and sale of said oleomargarine and butterine as their occupation or calling in life and continued from thence up until after the passage of the said act of May 21st, 1885, in the pursuit of their calling and occupation in life and made therefrom large gains and profits, and that in the manufacture of the said oleomargarine or butterine during all said time, the process of manufacture, the articles out of which it was manufactured, and the oleomargarine and butterine manufactured and sold was as hereinbefore stated.

That there was neither deceit nor fraud practiced in either the manufacture or sale of any of the oleomargarine, nor was it an adulterated product.

That the said act of May 21st, 1885, in prohibiting the manufacture or sale of the said oleomargarine or butterine, deprives the defendants of the gains and profits they had made in their calling and occupation and in the manufacture and sale of the said oleomargarine and butterine, besides rendering of much less value the ma-

chinery in which the said defendants invested as aforesaid and depriving the defendants of their calling or occupation in life.

And this for the purpose of showing (1st) that the manufacture and sale of oleomargarine or butterine, for which the defend-
65 ants are indicted, in no way injuriously affects the health, morals, peace, or the good order of society or of any citizen or resident of the State of Pennsylvania, and that the said oleomargarine or butterine manufactured and sold is not an adulteration of a dairy product, nor is it an adulterated article.

(2nd.) That the said act of May 21st, 1885, is not an exercise of or within the police power of the State of Pennsylvania.

(3rd.) That the said act of May 21st, 1885, is in conflict with and repugnant to the provisions of the 14th amendment of the Constitution of the United States, in that (*a*) it deprives the defendants of their liberty without due process of law, (*b*) in that it deprives the defendants of their property without due process of law, and (*c*) in that it denies to the defendants the equal protection of the laws of the State of Pennsylvania.

(4th.) That the said act is in conflict with and repugnant to the provisions of the Constitution of the State of Pennsylvania, in that it takes from the defendants their calling and property without due process of law and without compensation, and also in that it strikes down one industry (that of the manufacture and sale of oleomargarine) to benefit another industry (that of the manufacture and sale of butter produced from milk or cream).

Counsel for the Commonwealth object to the evidence offered by defendants upon the following grounds:

66 1st. The evidence is not material.

2nd. It is not relevant.

3rd. Even if the facts set forth in the offer were established by proof they would not constitute a legal defence.

Answer.

The recent case of Powell *vs.* The Commonwealth, decided by the supreme court of Pennsylvania in January of this year, in our opinion, decides the questions raised by this offer and is binding on us.

The objections to defendants' offer are sustained; the evidence is excluded.

To which ruling of the court counsel for defendants except, and thereupon bill sealed for defendants.

THOS. EWING. [SEAL.]

Which ruling of the court of quarter sessions of Allegheny county, Pennsylvania, was affirmed by the supreme court of Pennsylvania.

2nd. The court erred in sustaining the objections to and overruling an offer of defendants, which offer and the answer thereto is as follows:

The defendants' counsel now offer to prove that on and prior to the 21st day of May, 1885, their occupation or calling in life was the

manufacture and sale of oleomargarine or butterine in Allegheny county, Pennsylvania, and that prior to May 21st, 1885, and
67 in said county, in order to fit and prepare themselves for such occupation or calling, they had expended considerable sums of money and gone to great labor.

That in pursuance of their occupation and calling in life the defendants did after May 21st, 1885, manufacture and sell to the prosecuting witness the package of oleomargarine, and that said oleomargarine was made solely from pure animal fats, and the process of its manufacture was clean and wholesome, and that said oleomargarine is a wholesome and nutritious article of food and in all respects as wholesome and healthful as pure butter produced from pure, unadulterated milk or cream from the same; that there was no fraud or deception in either the manufacture or sale of said oleomargarine, and that said oleomargarine was not an adulterated product.

This for the purpose of showing—

(1st.) That by the said act of May 21st, 1885, the defendants are deprived of their liberty and property without due process of law.

(2nd.) That by the said act of May 21st, 1885, the defendants are denied the equal protection of the laws of the State of Pennsylvania.

(3rd.) That the said act of May 21st, 1885, is repugnant to the provisions of the 14th amendment to the Constitution of the United States.

(4th.) That the said act of May 21st, 1885, is not an exercise of or within the police powers of the State of Pennsylvania.

68 (5th.) That the said act of May 21st, 1885, is in conflict with and repugnant to the provisions of the constitution of the State of Pennsylvania.

Counsel for the Commonwealth object to the evidence offered for the reason that it is not relevant and it is not material. The act forbids the manufacture and sale of the article, and it is not material to the inquiry in this case whether it was sold openly or not, or whether it was pure or adulterated.

Answer.

The objections are sustained. The testimony offered is excluded. And thereupon bill sealed for defendants.

THOS. EWING. [SEAL.]

Which ruling of the court of quarter sessions of Allegheny county, Pennsylvania, was affirmed by the supreme court of Pennsylvania.

(3rd.) The defendants propose to prove by M. J. Sullivan that he saw the article sold to the prosecuting witness manufactured by defendants; that it was made from pure animal fats; that the process of manufacture was clean and wholesome; that the article contains the same elements as dairy butter; that the only difference between them is that the manufactured article contains a smaller proportion

of the fatty substance known as butterine; that this butter-
69 ine exists in dairy butter in the proportion of from three to seven per cent., and in the manufactured article in a smaller proportion, and was increased in the manufactured article by the introduction of milk and cream; that this having been done the article contains all the elements of butter produced from pure, unadulterated milk or cream from the same, except that the percentage of butterine is slightly smaller; that the only effect of butterine is to give flavor to the butter and has nothing to do with its wholesomeness; that the oleaginous substances in the manufactured article are substantially identical with those produced from milk or cream; that the article sold by the defendants to the prosecutor was a wholesome and nutritious article of food, and in all respects as wholesome and healthful as butter produced from pure, unadulterated milk or cream from the same.

This for the purpose of showing—

(1st.) That the said act of May 21st, 1885, is not within or an exercise of the police powers of the State of Pennsylvania.

(2nd.) That the said act of May 21st, 1885, is repugnant to and in conflict with the provisions of the fourteenth (14th) amendment to the Constitution of the United States.

(3rd.) That the said act of May 21st, 1885, deprives the defendant of his property and liberty without due process of law, and denies to him the equal protection of the laws of the State of Pennsylvania.

(4th.) That said act of May 21st, 1885, is in conflict with
70 the constitution of the State of Pennsylvania, in that it deprives him of his liberty or property without due process of law and without compensation.

Counsel for the Commonwealth object to the evidence for the reason that it is irrelevant and immaterial, and the evidence, if true, would not go to constitute a defence.

Answer.

The objections are sustained and bill sealed for the defendants.

THOS. EWING. [SEAL.]

Which ruling of the court of quarter sessions of Allegheny county, Pennsylvania, was affirmed by the supreme court of Pennsylvania.

4th. The court erred in refusing to affirm the following point, which point and the answer thereto is as follows:

(1st.) That the act of the General Assembly of the Commonwealth of Pennsylvania entitled "An act for the protection of the public health and to prevent the adulteration of dairy products and fraud in the sale thereof," approved May 21st, 1885, is repugnant to the provisions of the 14th amendment of the Constitution of the United States, in that it did and does deny to the defendants, persons within the jurisdiction of the State of Pennsylvania, the equal protection of the laws of the State of Pennsylvania.

Answer.

71 These questions having been passed on by the supreme court of the State and decided adversely to the contention of the defendants, they are refused.

Counsel for defendants except, and thereupon bill sealed for defendants.

THOS. EWING. [SEAL.]

Which ruling of the court of quarter sessions of Allegheny county, Pennsylvania, was affirmed by the supreme court of Pennsylvania.

5th. The court erred in refusing to affirm the following point, which point and the answer thereto is as follows:

2nd. That the act of the General Assembly of the Commonwealth of Pennsylvania entitled "An act for the protection of the public health and to prevent the adulteration of dairy products and fraud in the sale thereof," approved May 21st, 1885, is repugnant to the provisions of the 14th amendment of the Constitution of the United States, in that it did and does deprive the defendants of their liberty without due process of law.

Answer.

These questions having been passed on by the supreme court of the State and decided adversely to the contention of the defendants, they are refused.

Counsel for defendants except, and thereupon bill sealed for defendants.

THOS. EWING. [SEAL.]

72 Which ruling of the court of quarter sessions of Allegheny county, Pennsylvania, was affirmed by the supreme court of Pennsylvania.

6th. The court erred in refusing to affirm the following point, which point and the answer thereto is as follows:

(3rd.) That the act of the General Assembly of the Commonwealth of Pennsylvania entitled "An act for the protection of the public health and to prevent the adulteration of dairy products and fraud in the sale thereof," approved May 21st, 1885, is repugnant to the provisions of the 14th amendment to the Constitution of the United States, in that it did and does deprive the defendants of their property without due process of law.

Answer.

These questions having been passed on by the supreme court of the State and decided adversely to the contention of the defendants, they are refused.

Counsel for defendants except, and thereupon bill sealed for defendants.

THOS. EWING. [SEAL.]

Which ruling of the court of quarter sessions of Allegheny county, Pennsylvania, was affirmed by the supreme court of Pennsylvania.

7th. The court erred in refusing to affirm the following point, which point and the answer thereto is as follows:

73 (4th.) That the said act of the General Assembly, approved May 21st, 1885, is not an exercise of nor is it within the police powers of the State of Pennsylvania.

Answer.

These questions having been passed on by the supreme court of the State and decided adversely to the contention of the defendants, they are refused.

Counsel for defendants except, and thereupon bill sealed for defendants.

THOS. EWING. [SEAL.]

Which ruling of the court of quarter sessions of Allegheny county, Pennsylvania, was affirmed by the supreme court of Pennsylvania,

8th. The court erred in refusing to affirm the following point, which point and the answer thereto is as follows:

(5th.) That the said act of the General Assembly, approved May 21st, 1885, is repugnant to the provisions of the constitution of the State of Pennsylvania, in that it deprives the defendants of their liberty and property without due process of law and without compensation.

Answer.

These questions having been passed on by the supreme court of the State and decided adversely to the contention of the defendants, they are refused.

Counsel for defendants except, and thereupon bill sealed for defendants.

THOS. EWING. [SEAL.]

74 Which ruling of the court of quarter sessions of Allegheny county, Pennsylvania, was affirmed by the supreme court of Pennsylvania.

9th. The court erred in refusing to affirm the following point, which point and the answer thereto is as follows:

(6th.) That under the constitution of the State of Pennsylvania such class legislation in favor of one industry (dairy products) at the expense of another (oleomargarine) is illegal and void.

Answer.

These questions having been passed on by the supreme court of the State and decided adversely to the contention of the defendants' they are refused.

Counsel for defendants except, and thereupon bill sealed for defendants.

THOS. EWING. [SEAL.]

Which ruling of the court of quarter sessions of Allegheny county, Pennsylvania, was affirmed by the supreme court of Pennsylvania.

10th. The court erred in charging the jury as follows—

Charge of the Court.

GENTLEMEN OF THE JURY: The different counts in this indictment charge the defendants with violation of the act of Assembly, approved 21st May, 1885, entitled An act for the protection of dairymen and to prevent deception in sales of butter and cheese.

75 The supreme court of the State in the case of Powell *vs.* The Commonwealth, a case that went up from the court of quarter sessions of Dauphin county, has passed on this act and declared it constitutional.

That case seems to decide against the defendants all the questions they have attempted to raise here.

The defendants admit the commission of the acts charged in the indictment, the acts admitted are in violation of the act of Assembly, and the verdict should be guilty as indicted if you believe the uncontradicted evidence.

To the refusal of the court to affirm their points and to the charge of the court counsel for the defendants except, and thereupon bill sealed for the defendants.

THOS. EWING. [SEAL.]

Which charge of the court of quarter sessions of Allegheny county, Pennsylvania, was affirmed by the supreme court of Pennsylvania.

76 An act for the protection of the public health and to prevent adulteration of dairy products and fraud in the sale thereof.

SECTION 1. Be it enacted, &c., That no person, firm, or corporate body shall manufacture out of any oleaginous substance or any compound of the same other than that produced from unadulterated milk or cream from the same any article designed to take the place of butter or cheese produced from pure, unadulterated milk or cream from the same, or of any imitation or adulterated butter or cheese, nor shall sell or offer for sale or have in his, her, or their possession with intent to sell the same as an article of food.

SECTION 2. Every sale of such article or substance, which is prohibited by the first section of this act, made after this act shall take effect, is hereby declared to be unlawful and void, and no action shall be maintained in any of the courts of this State to recover upon any contract for the sale of any such article or substance.

SECTION 3. Every person, company, firm, or corporate body who shall manufacture, sell, or offer or expose for sale or have in his, her, or their possession with intent to sell any substance the manufacture and sale of which is prohibited by the first section of this act shall for every such offense forfeit and pay the sum of one hundred dollars, which shall be recoverable, with costs, by any person

77 suing in the name of the Commonwealth as debts of like amount are by law recoverable, one-half of which sum, when

so recovered, shall be paid to the proper county treasurer for the use of the county in which suit is brought, and the other half to the person or persons at whose instance such a suit shall or may be commenced and prosecuted to recovery.

SECTION 4. Every person who violates the provisions of the first section of this act shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than one hundred dollars nor more than three hundred, or by imprisonment in the county jail for not less than ten nor more than thirty days, or both, such fine and imprisonment for the first offense and imprisonment for one year for every subsequent offense.

SECTION 5. It shall be the duty of constables of the several cities, boroughs, wards, and townships of this Commonwealth to make quarterly reports under oath to the courts of quarter sessions of all violations of any of the provisions of this act which may come or be brought to their notice, and it shall be the duty of the judges of the said courts to see that the said returns are made regularly and faithfully.

SECTION 6. This act shall take effect on the first day of July, one thousand eight hundred and eighty-five.

SECTION 7. All acts or parts of acts inconsistent with the provisions of this act are hereby repealed.

Approved the 21st day of May, A. D. 1885.

ROB'T E. PATTISON.

78 And now here, on this 12th day of November, 1887, the said Hay Walker, Jr., John H. Wilson, Emil Winter, Harvey Wilson, and George Hasley produce to the supreme court of Pennsylvania here the writ of the United States of America for correcting of errors of and upon the premises, commanding the record and proceedings aforesaid of the judgment aforesaid, so as aforesaid rendered, with all things touching the same, to be transmitted to the Supreme Court of the United States to be held at the city of Washington on the second Monday of October next, which writ of error is hereunto annexed.

In pursuance whereof and according to the form and effect of the act of Congress in such case made and provided, a transcript of the record and proceedings of the judgment aforesaid, so as aforesaid rendered, with all things relating to the same, together with the said writ of error, are hereby transmitted to the said Supreme Court of the United States accordingly.

79 STATE OF PENNSYLVANIA, } *ss:*
County of Allegheny, }

In testimony that the foregoing is a full, true, and correct copy of the record and proceedings of the supreme court of Pennsylvania, the highest court of law and equity in the State of Pennsylvania, in the case lately decided therein, to No. 143, October term, 1887, western district, wherein Hay Walker, Jr., John H. Wilson, George Has-

ley, Emil Winter, and Harvey Wilson were plaintiffs in error and the Commonwealth of Pennsylvania was defendant in error, I have hereunto subscribed my name and affixed the seal of the said supreme court, at Pittsburgh, this 14th day of November, A. D. 1887.

[Seal of the Supreme Court of Pennsylvania.]

J. B. SWEITZER,
Pro. S. C., W. D.

Endorsed on cover: Pennsylvania supreme court. No. 1303. Hay Walker, Junior, John H. Wilson, Emil Winter, Harvey Wilson, and George Hasley, plaintiffs in error, *vs.* The Commonwealth of Pennsylvania. Filed November 16, 1887.

ley, Emil Winter, and Harvey Wilson were plaintiffs in error and the Commonwealth of Pennsylvania was defendant in error, I have hereunto subscribed my name and affixed the seal of the said supreme court, at Pittsburgh, this 14th day of November, A. D. 1887.

[Seal of the Supreme Court of Pennsylvania.]

J. B. SWEITZER,
Pro. S. C., W. D.

Endorsed on cover: Pennsylvania supreme court. No. 1303. Hay Walker, Junior, John H. Wilson, Emil Winter, Harvey Wilson, and George Hasley, plaintiffs in error, *vs.* The Commonwealth of Pennsylvania. Filed November 16, 1887.

IN THE

Supreme Court of the United States.

HAY WALKER, Jr., JOHN H. WILSON, EMIL WINTER, HARVEY WILSON, AND GEORGE HASLEY,

Plaintiffs in Error and Defendants Below,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

No. 1303, OCTOBER TERM, 1887.

Error to the Supreme Court of the State of Pennsylvania.

BRIEF OF PLAINTIFFS IN ERROR.

WEISS & GILBERT,
W. B. RODGERS,
D. T. WATSON,
Attorneys for Plaintiffs in Error.

IN THE

Supreme Court of the United States.

HAY WALKER, JR., JOHN H. WILSON, EMIL WINTER, HARVEY WILSON AND GEORGE HASLEY, PLAINTIFFS IN ERROR,

VS.

THE COMMONWEALTH OF PENNSYLVANIA,
DEFENDANT IN ERROR.

No. 1,303, OCTOBER TERM, 1887.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

STATEMENT OF FACTS.

(*References are to pages of printed Record.*)

The Plaintiffs in error were indicted, tried and convicted in the Court of Quarter Sessions of Allegheny County, Pennsylvania, for manufacturing and selling, and having for sale oleomargarine butter, in violation of the provisions of an Act of the General Assembly of the State of Pennsylvania, Approved May 21st, 1885, entitled an "Act for the protection of the public health and to prevent adulteration of dairy products and fraud in the sale thereof," a copy of which will be found in the Appendix.

The indictment was found April 27th, 1887, and consists of eight counts and will be found on pages 5, 6 and 7, of the record.

The first count charged that the Defendants, (Plaintiffs in error,)

> "Unlawfully did then and there manufacture out of a cer-
> "tain oleaginous substance other than that produced from
> "unadulterated milk and of cream from the same, large
> "quantities of a certain article designed to take the place of
> "butter produced from pure unadulterated milk and of cream
> "from the same, contrary to the form of the act of the Gen-
> "eral Assembly in such case made and provided and against
> "the peace and dignity of the Commonwealth of Pennsyl-
> "vania."

The third count charged that the Defendants

> "Unlawfully did then and there sell to one S. J. Adamson,
> "as an article of food, one tub of a certain article designed to
> "take the place of butter produced from pure unadulterated
> "milk and cream from the same, the said article designed to
> "take the place of butter as aforesaid being manufactured
> "out of a certain oleaginous substance and a compound of
> "the same other than that produced from unadulterated milk
> "and of cream from the same, contrary to the form of the
> "act of the General Assembly in such case made and provid-
> "ed, and against the peace and dignity of the Commonwealth
> "of Pennsylvania."

Under the proof of the Commonwealth on the trial below, it is unnecessary to print the other counts.

The Defendants pleaded "not guilty," and the case was tried May 12th, 1887, the entire evidence offered by the Commonwealth being as follows: (page 8.)—

> That the Defendants sold in Allegheny County, Pennsylvania, on the 2d day of Feb., 1887, as an article of food, to S. J. Adamson, the prosecuting witness in this case, one original package of an article manufactured in Allegheny County,

Pennsylvania, by the Defendants out of oleaginous substances and compounds other than that produced from unadulterated milk or cream from the same, and designed to take the place of butter produced from unadulterated milk or cream; that the said package was sold and bought as oleomargarine or butterine and not as butter produced from pure, unadulterated milk or cream from the same, and that the said Defendants had in their possession, with intent to sell the same as an article of food, the said package; and that the said package when sold was marked with the words "Oleomargarine butter" upon the lid and side of the package, in a straight line, in Roman letters one-half an inch long, as provided in the Act of the General Assembly of this State, entitled An Act for the protection of dairymen and to prevent deception in sales of butter and cheese, approved May 24th, 1883.

The Commonwealth then rested. There was no evidence on its part to show any adulteration of a food, product—or any deception or fraud—or that the article sold was not as wholesome as beef tea or wheat bread, or the very choicest dairy butter.

The Defendants below, Plaintiffs in error, then offered to prove (pages 8, 9, 10, 11,) as follows:

That prior to the 21st day of May, A. D. 1885, and on the 10th day of May, 1881, they were and they ever since have been and still are citizens of the State of Pennsylvania, residing within the county of Allegheny, in said State, and that on May the 10th, 1881, they associated themselves as a voluntary partnership organization (authorized by the laws of the State of Pennsylvania) under the name of the Pittsburgh Melting Company, for the purpose of the manufacture and sale of oleomargarine or butterine, it being an article manufactured out of oleaginous substances and compounds other than that produced from unadulterated milk or cream from the same, and designed to take the place of butter produced from unadulterated milk or cream: that on the 10th

day of May, 1881, and prior thereto, there was no statute or law in the State of Pennsylvania prohibiting such manufacture and sale, but, on the contrary thereof, there was in force an Act of the General Assembly of the State of Pennsylvania entitled "An Act to prevent deception in the sale of butter and cheese," approved May 22d, 1878, and that subsequent thereto the General Assembly of this State passed and the Governor approved an Act entitled An Act for the protection of dairymen and to prevent deception in the sale of butter and cheese, the said act being approved May 24th, 1883, and with this offer the Defendants offer in evidence each of the said acts.

That for the purpose of the manufacture of the said oleomargarine and butterine the said Defendants, under the name of the Pittsburgh Melting Company, purchased a large quantity of machinery in the years 1881, 1882 and 1883, especially made for and adapted to the manufacture of the said oleomargarine or butterine, and erected the said machinery in a building for that purpose, and prior to the 1st day of January, A. D. 1885, the said Defendants, under the name the Pittsburgh Melting Company, had invested in said machinery a sum of money exceeding $20,000, of which sum the Defendant, Hay Walker, contributed ten thousand dollars ($10,000.)

That the said Defendants continued to manufacture with the said machinery said oleomargarine or butterine and to sell said manufactured product up—and until and including the 21st day of May, 1885, at which time an act was passed by the General Assembly of the State of Pennsylvania and and approved by the Governor of said State, entitled An Act for the protection of the public health and to prevent adulteration of dairy products and fraud in the sale thereof, which act Defendant offers in evidence, it being the same act under which the indictment in this case is found.

That after the passage and approval of the said act of May 21, 1885, the said Defendants continued, just as before

its passage, to manufacture by the use of the said machinery, but not otherwise, said oleomargarine or butterine and to sell the same, and the identical package of oleomargarine or butterine which was sold to the prosecuting witness was manufactured by the said Defendants subsequent to the 21st day of May, 1885, but solely by the use of the said machinery purchased, as aforesaid, prior to said 21st day of May, 1885; that said Defendants, in the carrying on of their said business and in the manufacture of the said oleomargarine or butterine and in the manufacture of the identical package of oleomargarine or butterine hereinbefore specified, which was sold to the prosecuting witness in this case, used only pure animal fats; that the process of its manufacture was clean and wholesome; that the article manufactured contained the same elements as pure butter; that the only difference between them is that the manufactured article contains a smaller proportion of a fatty substance, which is know as butterine; that this butterine exists in pure butter in the proportion of from three to seven per cent. and in the manufactured article in a smaller proportion, and this was increased in the manufactured article by the introduction of milk and cream.

That this having been done, the article sold and manufactured contains all the elements of pure butter produced from pure, unadulterated milk or cream from the same, except that the percentage of butterine is slightly smaller; that the only effect of butterine is to give flavor to the butter, and it has nothing to do with its wholesomeness; that the oleoginous substances in the manufactured article are substantially identical with those produced from milk or cream, and that the article manufactured and sold by the Defendants to the prosecuting witness is a wholesome and nutritious article of food made, as hereinbefore stated, by the use of machinery appliances purchased and owned by said Defendant prior to the 21st day of May, 1885, and that the said butterine or oleomargarine, as manufactured and sold to the prose-

cuting witness, was in all respects as wholesome and healthful as butter produced from pure, unadultered milk or cream from the same.

That the said act of May 21st, 1885, prevents the said Defendants from using the said machinery as aforesaid for the manufacture of oleomargarine or butterine, and that by such deprivation the said machinery is much depreciated in value and rendered almost useless, and instead of being worth the sum of $20,000, as it would be if used for the said purposes for which was made or used, it is rendered of much less value, being worth only the sum of $5,000.

That prior to the said 21st day of May, 1885, and on the 10th day of May, 1881, the said Defendants expended considerable sums of money and went to great labor to fit themselves for the pursuit of the calling of the manufacture and sale of oleomargarine or butterine, and that they then (May 10th, 1881), adopted the manufacture and sale of said oleomargarine and butterine as their occupation or calling in life, and continued from thence up until after the passage of the said act of May 21st, 1885, in the pursuit of their calling and occupation in life and made therefrom large gains and profits, and that in the manufacture of the said oleomargarine or butterine during all said time the process of manufacture, the articles out of which it was manufactured, and the oleomargarine and butterine manufactured and sold was as hereinbefore stated.

That there was neither deceit nor fraud practised in either the manufacture or sale of any of the oleomargarine nor was it an adulterated product.

That the said act of May 21st, 1885, in prohibiting the manufacture or sale of the said oleomargarine or butterine deprives the Defendants of the gains and profits they had made in their calling and occupation and in the manufacture any sale of the said oleomargarine and butterine, besides ren-

dering of much less value the machinery in which the said Defendants invested as aforesaid and depriving the Defendants of their calling or occupation in life.

And this for the purpose of showing—

1st. That the manufacture and sale of oleomargarine or butterine, for which the Defendants are indicted, in no way injuriously affects the health, morals, peace, or the good order of society, or of any citizen or resident of the State of Pennsylvania, and that the said oleomargarine or butterine manufactured and sold is not an adulteration of a dairy product, nor is it an adulterated article.

2d. That the said act of May 21st, 1885, is not an exercise of or within the police power of the State of Pennsylvania.

3d. That the said act of May 21st, 1885, is in conflict with and repugnant to the provisions of the 14th amendment of the Constitution of the United States, in that (*a*) it deprives the Defendants of the property without due process of law; (*b*) in that it deprives the Defendants of their property without due process of law; and (*c*) in that it denies to the Defendants the equal protection of the laws of the State of Pennsylvania.

4th. That the said act is in conflict with and repugnant to the provisions of the Constitution of the State of Pennsylvania, in that it takes from the Defendants their calling and property without due process of law and without compensation, and also in that it strikes down one industry (that of the manufacture and sale of oleomargarine) to benefit another industry (that of the manufacture and sale of butter produced from milk or cream.)

OBJECTIONS TO OFFER "A".

Counsel for the Commonwealth object to the evidence offered by defendants upon the following grounds:

1st. The evidence is not material.

2nd. It is not relevant.

3d. Even if the facts set forth in the offer were established by proof that they would not statute a legal defense.

RULING OF THE COURT.

BY THE COURT: The recent case of *The Powell vs. Commonwealth*, decided by the Supreme Court of Penna. in January of this year, in our opinion, decides the questions raised by this offer, and is binding on us.

The objection to defendant's offer "A" are sustained; the evidence is excluded; to which ruling of the Court counsel for defendants except, and thereupon bill sealed for defendants.

THOS. EWING, [SEAL.]

Defendants then offered to prove:

"That on and prior to the 21st day of May, 1885, their "occupation or calling in life was the manufacture and sale "of oleomargarine or butterine in Allegheny county, Penn- "sylvania, and that prior to May 21st, 1885, and in said "county, in order to fit and prepare themselves for such occu- "pation or calling, they had expended considerable sums of "money and gone to great labor.

"That in pursuance of their occupation and calling in life "the defendants did, after May 21st, 1885, manufacture and "sell to the prosecuting witness the package of oleomargarine, "and that said oleomargarine was made solely from pure "animal fats, and the process of its manufacture was clean "and wholesome, and that said oleomargarine is a whole- "some and nutritious article of food, and in all respects as

"wholesome and healthful as pure butter produced from "pure, unadulterated milk or cream from the same: that "there was no fraud or deception in either the manufacture "or sale of said oleomargarine and that said oleomargar- "ine was not an adulterated product."

This for the purpose of showing:

1st. That by the said Act of May 21st, 1885, the defendants are deprived of their liberty and property without due process of law.

2nd, That by the said Act of May 21st, 1885, the defendants are denied the equal protection of the laws of the State of Pennsylvania.

3rd. That the said Act of May 21st, 1885, is repugnant to the provisions of the Fourteenth Amendment to the Constitution of the United States.

4th. That the said Act of May 22st, 1885, is not an exercise of or within the police powers of the State of Pennsylvania.

5th. That the said Act of May 21st, 1885 is in conflict with and repugnant to the provisions of the Constitution of the State of Pennsylvania.

Counsel for the Commonwealth object to the evidence offered for the reason that it is not relevant and is not material. The Act forbids the manufacture and sale of the article, and it is not material to the inquiry in this case whether it was sold openly or not, nor whether it was pure or adulterated.

RULING.

The objections are sustained; the testimony offered is excluded.

And thereupon bill sealed for defendants.

THOS. EWING. [SEAL.]

Defendant's then offered to prove:

"By M. J. Sullivan that he saw the article sold to "the prosecuting witness manufactured by defendants; that "it was made from pure animal fats; that the process of "manufacture was clean and wholesome; that the article con- "tains the same elements as dairy butter; that the only dif- "ference between them is that the manufactured article con- "tains a smaller proportion of the fatty substance known as "butterine; that this butterine exists in dairy butter in the "proportion of from three to seven per cent. and in the man- "ufactured article in a smaller proportion, and was increased "in the manufactured article by the introduction of milk and "cream; that this having been done, the article contains all "the elements of butter produced from pure, unadulterated "milk or cream from the same, except that the percentage of "butterine is slightly smaller, that the only effect of butter- "is to give flavor to the butter and has nothing to do with "its wholesomeness; that the oleaginous substance in the "manufactured article are substantially identical with those "produced from milk or cream; that the article sold by the "defendants to the prosecutor was a wholesome and nutri- "tious article of food and in all respects as wholesome and "healthful as butter produced from pure, unadulterated milk "or cream from the same."

This for the purpose of showing—

1st. That the said act of May 21st, 1885, is not within or an exercise of the police powers of the State of Pennsylvania.

2d. That the said act of May 21, 1885, is repugnant to and in conflict with the provisions of the fourteenth (14) amendment to the Constitution of the United States.

3rd. That the said Act of May 21st, 1885, deprives the Defendant of his property and liberty without due proces of law, and denies to him the equal protection of the laws of the State of Pennsylvania.

4th. That said Act of May 21st, 1885, is in conflict with the Constitution of the State of Pennsylvania, in that it deprives him of his liberty or property without due process of law and without compensation.

Counsel for the Commonwealth object to the evidence for the reason that it is irrelevant and immaterial, and the evidence, if true, would not go to constitute a defense.

RULING.

The objections are sustained and bill sealed for the Defendants.

THOS. EWING. [SEAL.]

No other evidence was offered, but the Defendants insisted and asked in writing the Court to charge that the Act of May 21st, 1885, under which they were indicted, was in conflict with the provisions of the Fourteenth (14th) Amendment to the Federal Constitution, in so far as it prohibited the manufacture or sale of or having for sale of oleomargarine butter.

(See pages 13 and 14 of the Record.)

The Court refused so to charge, but on the contrary held that the Act was constitutional and valid and that the Defendants were guilty of the offenses charged, and the Jury so found. On the verdict judgment was entered and the Defendants were sentenced to pay a fine of one hundred dollars.

To the judgment of conviction in the Court of Quarter Sessions, a writ of error was sued out from the Supreme Court of Pennsylvania, and that Court affirmed the judgment of the lower Court, though the conflict between the Act and the Fourteenth (14th) Amendment was particularly urged.

The General Assembly of the State of Pennsylvania had passed an Act, approved May 24th, 1883, (*P. L.* 43) which was entitled, "An Act for the protection of dairymen and to prevent deception in sales of butter and cheese."

This related to Oleomargarine butter, and required the packages to be plainly branded or stamped "Oleomargarine Butter" in Roman letters, one-half inch long, and as the Commonwealth itself proved by the admission on which its case depends the "oleomargarine" sold to prosecuting witness, as also that in possession of the Defendant, was so stamped.

An Act had prior thereto been passed, approved May 23, 1878, (*P. L.* 87 and 88) entitled "An Act to prevent deception in the sale of butter and cheese" which required the stamp to be merely of the word "Oleomargarine."

Copies of each of these Acts will be found in the Appendix.

The history of Oleomargarine butter is briefly this: One Hippolyte Mége who was a noted scientist in France, for a number of years conducted a series of experiments for the purpose of obtaining a healthful and cheaper fat for the use of the working people than the poor butter that they were compelled to use, and as a result of such experiment he discovered that the fat of the beef animals and the fat from which dairy butter was made, were substantially identical, and that an artificial treatment of beef fat produced substantially the same product as dairy butter at very much less expense.

In 1869, a patent was issued to him for his discovery of date, July 15th, 1869, by France. On October 31st, 1869, Austria granted him a patent for the same thing. In England, on July 17th, 1869, a patent was granted him for the same thing. In Bavaria, a patent was granted him on April 8th, 1873, for the same matter. On December 13th, 1873, he made an application in the United States for a patent, which was granted, December 30th, 1873, and of which there were several re-issues; but this patent was held to have expired in April, 1876, by reason of the of the fact that that was the date of the expiration of the Bavarian patent.

See the case of *The Commercial Manufactory Consolidated et. al. vs. The Fairbank Canning Company. The Official Gazette of the United States Patent Office, Vol.* 36, *No.* 13, *page* 1473.

Oleomargarine butter is manufactured in the following manner: The fleshy fat of the beef is soaked in tepid water for about one hour, and is then washed and soaked in clear water. It is then hashed by machinery and heated in water-jacketed caldrons where the heat should never exceed 124° Fahrenheit. This heat divides the fat into (1) shreds of the membranes which settle at the bottom, (2) clear oil which is next, (3) a scum of the emulsion of fat and water. This oil is drawn off and kept for from thirty to thirty-six hours at a temperature of 85° Fahrenheit, when a portion of the stearine and palmatine crystalizes while the more easily fusible components remain as a liquor which is then squeezed out by pressure. The oil thus squeezed out in cooling hardens or freezes into a semi-solid condition and this constitutes a product known as oleomargarine or pearl oil. This oleomargarine is then treated the same as butter and is churned with milk and the product of the churning is called oleomargarine butter.

Appleton's Cyclopedia of Applied Mechanics, Title, Oleomargarine.

The Library of Universal Knowledge, Title, Oleomargarine.

The Encyclopedia Britannica, Title, Oleomargarine.

Report of the Commissioner of Internal Revenue for the fiscal year ending June 30th, 1887.

This is the product which Powell was indicted and punished for selling.

"Butter is an oily unctious substance obtained from milk or cream by churning." (Webster.)

The oily substance is from this same animal fat and is obtained by the cow elaborating her own fat through her cellulary mammary tissues at the temperature of her body. Globules of oil are taken from the cow by the extraction of her secretion, called milk, and by agitation of the milk these globules of oil are extracted from the other component parts of the milk, and after being treated as oleomargarine is, produces what is known as butter, or to distinguish it, dairy butter.

There are two ways then of producing butter. One is by the agitation of the milk and cream in the process of churning as above described and the addition of salt, etc., and the product of this is commonly known as butter, or dairy butter.

The other is by treating the animal fat of the beef as herein before described and then by the process of churning with milk and the addition of salt, etc., the product is produced called oleomargarine butter.

The two products are substantially identical, the difference being only that oleomargarine butter contains a smaller proportion of a fatty substance known as butterine, but this in no way affects its wholesomeness. This butterine in dairy butter exists in proportion of from three to seven per cent, while in the manufactured article it exists in a slightly smaller proportion.

Oleomargarine butter is just as wholesome and healthful as dairy butter.

Our offers of evidence (cited *supra*) would seem conclusively to show in substance the facts hereinbefore given, and if any additional authority is wanting we would refer this Court to the Encyclopedias hereinbefore referred to, or to any scientific or standard treatise on the question, and especially to the report of the Commissioner of Internal Revenue for the year ending June 30, 1887.

By an Act approved August 2d, 1886, Congress provided for the taxation of oleomargarine butter, and the regulation of its manufacture and sale.

United States Statutes at Large, vol. 24, *page* 209.

This Act provides for the appointment of an analytical chemist and a microscopist, and with their assistance gives to the Commissioner the power to decide whether any of the ingredients of any packages of oleomargarine butter contains matter deleterious to the public health, and in case of doubt, a Board com-

posed of the Surgeon-General of the Navy, Surgeon-General of the Army, and the Commission of Agriculture, who shall pass upon the question, and the decisions of this Board are conclusive.

The report of the Commissioner of Internal Revenue for the year ending June 30th, 1887, shows that for the eight months preceding June 30th, 1887, there was sold 21,796,202 pounds of oleomargarine butter which paid a tax under this Act.

To the judgment of the highest Court in the State of Pennsylvania, a writ of error was sued out to this Court, and the ground upon which we ask the interference of this Court, is that the oleomargarine act under which Powell was convicted and sentenced is in conflict with the fourteenth (14) amendment to the Federal Constitution in so far as it prohibits the manufacture and sale, or having for sale of oleomargarine.

The Federal questions are raised in this case by our offers of evidence in the trial Court, specifying the particular purpose of the evidence; being, amongst other things, to show, that the Defendants were denied the equal protection of the laws of the State of Pennsylvania, and that the Act of May 21st, 1885, under which they were tried, convicted and sentenced, deprived them of their property and liberty without due process of law: (pages 10, 11, 12, 13.) By insisting in the trial Court that the Act of May 21st, 1885, was in conflict with the 14th Amendment to the Federal Constitution, because it denied to the Defendants the equal protection of the laws and deprived them of their property and liberty without due process of law, and by requesting the Court in writing to so charge. (Pages 13, 14).

By assigning for error in the Supreme Court of the State the refusal of the Court below to admit our several offers of evidence for the purposes for which they were offered, and also the refusal of the trial Court to charge as requested in writing.

And lastly by assigning here for error the action of the Supreme Court of the State in affirming the rulings of the trial

Court and in holding that the Act of May 21st, 1885, in forbidding the manufacture and sale of oleomargarine butter was not in conflict with any of the provisions of the Federal Constitution.

ASSIGNMENTS OF ERROR.

(1.) The Court erred in sustaining the objections to and overruling an offer of Plaintiffs in error and Defendants below, which offer and the answer thereto are as follows:

1st. The Defendants now offer to prove that prior to the 21st day of May, A. D. 1885, and on the 20th day of May 1881, they were and they ever since have been and still are citizens of the State of Pennsylvania, residing within the County of Allegheny, in said State, and that on May 10ih, 1881, they associated themselves as a voluntary partnership organization (authorized by the laws of the State of Pennsylvania) under the name of the Pittsburgh Melting Company, for the purpose of the manufacture and sale of oleomargarine or butterine, it being an article manufactured out of oleaginous substances and compounds other than that produced from unadulterated milk or cream from the same, and designed to take the place of butter produced from unadulterated milk or cream; that on the 10th day of May, 1881, and prior thereto, there was no statute or law in the State of Pennsylvania prohibiting such manufacture and sale, but, on the contrary thereof, there was in force an act of the General Assembly of the State of Pennsylvania, entitled "An act to prevent deception in the sale of butter and cheese," approved May 22nd, 1878, and that subsequent thereto the General Assembly of this State passed and the Governor approved an act entitled "An act for the protection of dairymen and to prevent deception in the sale of butter and cheese," the said act being approved May 24th, 1883, and with this offer the Defendant offers in evidence each of the said acts.

That for the purpose of the manufacture of the said oleomargarine and butterine the said Defendants, under the

name of the Pittsburgh Melting Company, purchased a large quantity of machinery in the years 1881, 1882 and 1883, especially made for and adapted to the manufacture of the said oleomargarine or butterine, and erected the said machinery in a building for that purpose, and prior to the 1st day of January, A. D. 1885, the said Defendants, under the name of the Pittsburgh Melting Company, had invested in said machinery a sum of money exceeding $20,000, of which sum the Defendant, Hay Walker, contributed ($10,000) ten thousand dollars.

That the said Defendants continued to manufacture with the said machinery said oleomargarine or butterine, and to sell said manufactured product up and until and including the 21st day of May, 1885, at which time an act was passed by the General Assembly of the State of Pennsylvania and approved by the Governor of said State, entitled "An Act for the protection of the public health and to prevent adulteration of dairy products and fraud in the sale thereof," which act the Defendants offer in evidence, it being the same Act under which the indictment in this case is found.

That after the passage and approval of the said Act of May 21st, 1885, the said Defendants continued just as before its passage to manufacture by the use of the said machinery, but not otherwise, said oleomargarine or butterine and to sell the same, and the identical of oleomargarine or butterine which was sold to the prosecuting witness was manufactured by the said Defendants subsequent to the 21st day of May, 1885, but solely by the use of the said machinery purchased as aforesaid prior to said 21st day of May, 1885.

That said Defendants in the carrying on of their said business and in the manufacture of the said oleomargarine or butterine, and the manufacture of the identical package of oleomargerine or butterine hereinbefore specified which was sold to the prosecuting witness in this case used only pure

animal fats; that the process of its manufacture was clean and wholesome; that the articles manufactured contained the same elements as pure butter; that the only difference between them is that the manufactured article contains a smaller proportion of a fatty substance, which is known as butterine; that this butterine exists in pure butter in the proportion of from three to seven per cent., and in the manufactured article in a smaller proportion, and this was increased in the manufactured article by the introduction of milk and cream.

That this having been done the article sold and manufactured contains all the elements of pure butter produced from pure unadulterated milk or cream from the same, except that the percentage of butterine is slightly smaller; that the only effect of butterine is to give flavor to the butter, and it has nothing to do with its wholesomeness; that the oleaginous substances in the manufactured article are substantially identical with those produced from milk or cream, and that the article manufactured and sold by the Defendants to the prosecuting witness is a wholesome and nutritious article of food, made, as hereinbefore stated, by the use of machinery and appliances purchased and owned by said Defendants prior to the 21st day of May, 1885, and that the said butterine or oleomargarine as manufactured and sold to the prosecuting witness was in all respects as wholesome and healthful as butter produced from pure, unadulterated milk or cream from the same.

That the said Act of May 21st, 1885, prevents the said Defendants from using the said machinery as aforesaid for the manufacture of oleomargarine or butterine, and that by such deprivation the said machinery is much depricated in value, and rendered almost useless, and instead of being worth the sum of $20,000, as it would be if used for the said purposes for which it was made or used, it is rendered of much less value, being worth only the sum of $5,000.

That prior to the said 21st of day of May, 1885, and on the 10th day of May, 1881, the said Defendants expended

considerable sums of money, and went to great labor to fit themselves for the pursuit of the calling of the manufacture and sale of oleomargarine or butterine, and that they then (May 10th, 1881) adopted the manufacture and sale of said oleomargarine and butterine as their occupation or calling in life, and continued from thence up until after the passage of the said Act of May 21st, 1885, in the pursuit of their calling and occupation in life, and made therefrom large gains and profits, and that in the manufacture of the said oleomargerine or butterine during all said time, the process of manufacture, the articles out of which it was manufactured, and the oleomargarine and butterine manufactured and sold was as hereinbefore stated.

That there was neither deceit nor fraud practised in either the manufacture or sale of any of the oleomargarine, nor was it an adulterated product.

That the said Act of May 21st, 1885, in prohibiting the manufacture or sale of the said oleomargarine or butterine, deprives the Defendants of the gains and profits they had made in their calling and occupation, and in the manufacture and sale of the said oleomargarine and butterine, besides rendering of much less value the machinery in which the said Defendants invested as aforesaid, and depriving the Defendants of their calling or occupation in life.

And this for the purpose of showing (1st) that the manufacture and sale of oleomargarine or butterine, for which the Defendants are indicted, in no way injuriously affects the health, morals, peace, or the good order of society or of any citizen or resident of the State of Pennsylvania, and that the said oleomargarine or butterine manufactured and sold is not an adulteration of a dairy product, nor is it an adulterated article.

(2nd.) That the said Act of May 21st, 1885, is not an exercise of or within the police power of the State of Pennsylvania.

(3rd.) That the said Act of May 21st, 1885, is in conflict with and repugnant to the provisions of the 14th amendment of the Constitution of the United States, in that (*a*) it deprives the defendants of their liberty without due process of law, (*b*) in that it deprives the defendants of their process without due process of law, and (*c*) in that it denies that the defendants the equal protection of the laws of the State of Pennsylvania.

(4th.) That the said Act is in conflict with and repugnant to the provisions of the Constitution of the State of Pennsylvania, in that it takes from the defendants their calling and property without due process of law and without compensation, and also in that it strikes down one industry (that of the manufacture and sale of oleomargarine) to benefit another industry (that of the manufacture and sale of butter produced from milk or cream.)

Counsel for the Commonwealth object to the evidence offered by the defendants upon the following grounds:

1st. The evidence is not material.

2nd. It is not relevant.

3rd. Even if the facts set forth in the offer were established by the proof they would not constitute a legal defence.

ANSWER.

The recent case of Powell *vs.* The Commonwealth, decided by the Supreme Court of Pennsylvania in January of this year, in our opinion, decides the questions raised by this offer and is binding on us.

The objections to defendants' offer are sustained; the evidence is excluded.

To which ruling of the Court counsel for defendants except, and thereupon bill sealed for defendants.

THOS. EWING. [SEAL.]

Which ruling of the Court of Quarter Sessions of Allegheny County, Pennsylvania, was affirmed by the Supreme Court of Pennsylvania.

2nd. The Court erred in sustaining the objections to and overruling an offer of Plaintiffs in error and Defendants, below, which offer and the answer thereto are as follows:

The Defendants' counsel now offer to prove that on and prior to the 21st day of May, 1885, their occupation or calling in life was the manufacture and sale of oleomargarine or butterine in Allegheny County, Pennsylvania, and that prior to May 21st, 1885, and in said county, in order to fit and prepare themselves for such occupation or calling, they had expended considerable sums of money and gone to great labor.

That in pursuance of their occupation and calling in life the Defendants did after May 21st, 1885, manufacture and sell to the prosecuting witness the package of oleomargarine, and that said oleomargarine was made solely from pure animal fats, and the process of its manufacture was clean and wholesome, and that said oleomargarine is a wholesome and nutritious article of food and in all respects as wholesome and healthful as pure butter produced from pure, unadulterated milk or cream from the same; that there was no fraud or deception in either the manufacture or sale of said oleomargarine, and that said oleomargarine was not an adulterated product.

This for the purpose of showing—

(1st.) That by the said Act of May 21st, 1885, the

Defendants are deprived of their liberty and property without due process of law.

(2nd.) That by the said Act of May 21st, 1885, the Defendants are denied the equal protection of the laws of the State of Pennsylvania.

(3rd.) That the said Act of May 21st, 1885, is repugnant to the provisions of the 14th amendment to the Constitution of the United States.

(4th.) That the said Act of May 21st, 1885, is not an exercise of or within the police powers of the State of Pennsylvania.

(5th.) That the said Act of May 21st, 1885, is in conflict with and repugnant to the provisions of the Constitution of the State of Pennsylvania.

Counsel for the Commonwealth object to the evidence offered for the reason that it is not relevant and it is not material. The Act forbids the manufacture and sale of the article, and it is not material to the inquiry in this case whether it was sold openly or not, or whether it was pure or adulterated.

ANSWER.

The objections are sustained. The testimony offered is excluded.

And thereupon bill sealed for the defendants.

THOS. EWING. [SEAL.]

Which ruling of the Court of Quarter Sessions of Allegheny county, Pennsylvania, was affirmed by the Supreme Court of Pennsylvania.

(III.) The Court erred in sustaining the objections to and in

over ruling an offer of the Plaintiffs in error, Defendants below, which offer and objection thereto. are as follows:

(3rd.) "The Defendants propose to prove by M. J. Sulli-
"van that he saw the article sold to the prosecuting witness
"manufactured by Defendants; that it was made from pure
"animal fats; that the process of manufacture was clean and
"wholesome; that the article contains the same elements as
"dairy butter; that the only difference between them is that
"the manufactured article contains a smaller proportion of
"the fatty substance known as butterine; that this butterine
"exists in dairy butter in the proportion of from three to
"seven per cent., and in the manufactured article in a smaller
"proportion, and was increassd in the manufactured article
"by the introduction of milk and cream; that this having
"been done the article contains all the elements of butter
"produced from pure, unadulterated milk or cream from the
"same, except that the percentage of butterine is slightly
"smaller; that the only effect of butterine is to give flavor to
"the butter and has nothing to do with its wholesomeness;
"that the oleaginous substance in the manufactured article
"are substantially ieentical with those produced from milk or
"cream; that the article sold by the Defendants to the pros-
"ecutor was a wholesome and nutritious article of food, and
"in all respects as wholesome and healthful as butter pro-
"duced from pure, unadulterated milk or cream from the
"same."

This for the purpose of showing:

(1st.) That the said Act of May 21st, 1885, is not within or an exercise of the police powers of the State of Pennsylvania.

(2nd.) That the said Act of May 21st, 1885, is repugnant to and in conflict with the provisions of the Fourteenth (14th) Amendment to the Constitution of the United States.

(3rd.) That the said Act of May 21st, 1885, deprives the Defendant of his property and liberty without due process of law and denies to him the equal protection of the laws of the State of Pennsylvania.

(4th.) That said Act of May 21st, 1885, is in conflict with the constitution of the State of Pennsylvania, in that it deprives him of his liberty or property without due process of law and without compensation.

Counsel for the Commonwealth object to the evidence for the reason that it is irrelevant and immaterial, and the evidence, if true, would not go to constitute a defence.

ANSWER.

The objections are sustained and bill sealed for the Defendants.

THOS. EWING. [SEAL.]

Which ruling of the Court of Quarter Sessions, of Allegheny county, Pennsylvania, was affirmed by the Supreme Court of Pennsylvania.

6th. The Court erred in refusing to affirm the following point, which point and the answer thereto is as follows:

(1st.) That the Act of the General Assembly of the commonwealth of Pennsylvania entitled "An Act for the protectection of the public health and to prevent the adulteration of dairy products and fraud in the sale thereof," approved May 21st, 1885, is repugnant to the provisions of the Fourteenth Amendment of the Constitution of the United States, in that it did and does deny to the Defendants, persons within the jourisdiction of the State of Pennsylvania, the equal protection of the laws of the State of Pennsylvania.

ANSWER.

These questions having been passed on by the Supreme Court of the State and decided adversely to the contention of the Defendants, they are refused.

Counsel for Defendants except, and thereupon bill sealed for Defendants.

THOS. EWING. [SEAL.]

Which ruling of the Court of Quarter Sessions of Allegheny county, Pennsylvania, was affirmed by [the Supreme Court of Pennsylvania.

(5th.) The Court erred in refusing to affirm the following point, which point and the answer thereto is as follows:

(2nd.) That the Act of the General Assembly of the Commonwealth of Pennsylvania entitled "An Act for the protection of the public health and to prevent the adulteration of dairy products and fraud in the sale thereof," approved May 21st, 1885, is repugnant to the provision of the Fourteenth Amendment of the Constitution of the United States, in that it did and does deprive the Defendants of their liberty without due process of law.

ANSWER.

These questions having been passed on by the Supreme Court of the State and decided adversely to the contention of the Defendants, they are refused.

Counsel for Defendants except, and thereupon bill sealed for Defendants.

THOS. EWING. [SEAL.]

Which ruling of the Court of Quarter Sessions of Allegheny County, Pennsylvania, was affirmed by the Supreme Court of Pennsylvania.

(6th.) The Court erred in refusing to affirm the following point, which point and the answer thereto is as follows:

(3rd.) That the Act of the General Assembly of the Commonwealth of Pennsylvania, entitled, "An Act for the protection of the public health and to prevent the adulteration of dairy products and fraud in the sale thereof," approved May 21st, 1885, is repugnant to the provisions of the 14th

amendment of the Constitution of the United States, in that it did and does deprive the Defendants of their property without due process of law.

ANSWER.

These questions having been passed on by the Supreme Court of the State and decided adversely to the contention of the Defendants, they are refused.

Counsel for Defendants except, and thereupon bill sealed for Defendants.

THOS. EWING. [SEAL.]

Which ruling of the Court of Quarter Sessions of Allegheny County, Pennsylvania, was affirmed by the Supreme Court of Pennsylvania.

7th. The Court erred in refusing to affirm the following point, which point and the answer thereto, are as follows:

(4th.) That the said Act of the General Assembly, approved May 21st, 1885, is not an exercise of nor is it within the police powerss of the State of Pennsylvania.

ANSWER.

These questions having been passed on by the Supreme Court of the State and decided adversely to the contention of the Defendants, they are refused.

Counsel for Defendants except, and thereupon bill sealed for defendants.

THOS. EWING, [SEAL.]

Which ruling of the Court of Quarter Sessions of Allegheny County, Pennsylvania, was affirmed by the Supreme Court of Pennsylvania.

8th. The Court erred in charging the jury as follows:

Charge of the Court.

GENTLEMEN OF THE JURY: The different counts in this indictment charge the Defendants with violation of the Act of Assembly, approved 21st May, 1885, entitled "An Act for the protection of dairymen, and to prevent deception in sales of butter and cheese."

The Supreme Court of the State in the case of *Powell vs. The Commonwealth*, a case that went up from the Court of Quarter Sessions of Dauphin County, has passed on this Act and declared it constitutional.

That case seems to decide against the Defendants all the questions they have attempted to raise here.

The Defendants admit the commission of the acts charged in the indictment; the acts admitted are in violation of the Act of Assembly, and the verdict should be guilty as indicted, if you believe the uncontradicted evidence.

To the refusal of the Court to affirm their points, and to the charge of the Court, Counsel for the Defendants except, and thereupon bill sealed for the Defendants.

THOS. EWING, [SEAL.]

Which charge of the Court of Quarter Sessions of Allegheny County, Pennsylvania, was affirmed by the Supreme Court of Pennsylvania.

(9th.) The conviction and sentence of the Plaintiffs in error by the Quarter Sessions, of Allegheny County, Pennsylvania, affirmed by the Supreme Court of Pennsylvania, deprived them of their liberty, and property without due process of law, and denied to them the equal protection of the laws.

POINTS OF LAW.

(1.) The Supreme Court of Pennsylvania affirmed the constitutionality of the State Act on the ground that the Legislature was the sole judge of the limits of the police power and that the State Court was powerless to determine whether the Act in question had in truth a real and substantial relation to the public health, morals, peace or good order.

That we do no injustice to the Supreme Court of Pennsylvania in stating this conclusion, we refer to the entire opinion [pages 28 to 32, record in the Powell case], and we quote liberally from it.

The opinion, page 29 of the record says:

"We cannot try the constitutionality of a Legislative Act "by the motives and designs of the law-makers however "plainly expressed. If the Act itself is within the scope of "their authority it must stand. * * * *

The Act of May 21st, 1885, is entitled, "An Act for the protection of the public health, and to prevent adulteration of dairy products and fraud in the sale thereof."

"It cannot be doubted that the General Assembly is in- "vested with full power to legislate for the protection of the "public health or to prevent the adulteration of articles of "food as well as imposition or fraud in the sale of said "articles.

"In the absence of any constitutional inhibition or limi- "tation, the sovereign power of the State to enact laws for "the public good appears to embrace these subjects of legis- "lation. But however that may be they are fairly within the "police powers of the State. * * * *

"So far as the constitutionality of the act under consider- "ation depends on the police power of the State, it may "safely be rested on the principle underlying the cases above

See also the testimony taken before the Committee in the Senate on the Oleomargarine Bill as passed.

Record, 1st Session XLIX Congress, vol. 17, *pages* 5,044, 5,202.

The Department of Agriculture endorsed the following report of Professor Atwater:

> "To recapitulate briefly, butter and oleomargarine have "very nearly the same chemical composition. In digestibil- "ity there may be a slight balance in favor of butter, though "for the nourishment of healthy persons this difference can "hardly be of any considerable consequence. For supplying "the body with heat and muscular energy, which is their "chief use in nutrition, they are of practically equal value, "excelling in this respect all other common food materials. "Such, at any rate, is the practically unanimous testimony "of the latest and best experimental research."

Agricultural Department.
Division of Chemistry.
Bulletin No. 13, *part* 1, *page* 24.

"the opinion referred to, and also in that of the Court be- "low, we cannot say the act in question is not a valid exer- "cise of the police power of the State. *The Legislature was* "*doubtless satisfied that the manufacture and sale* of the pro- "hibited articles were prejudicial to the public good to such "a degree that a remedy was needed; and we have no right "to say that a penal statute less severe and sweeping in its "terms would have afforded an effective remedy. That is a "legislative and not a judicial question. If it is thought

"In the absence of any constitutional inhibition or limi-
"tation, the sovereign power of the State to enact laws for
"the public good appears to embrace these subjects of legis-
"lation. But however that may be they are fairly within the
"police powers of the State. * * * *

"So far as the constitutionality of the act under consider-
"ation depends on the police power of the State, it may
"safely be rested on the principle underlying the cases above

" referred to and those that might be cited. The manufac-
" ture, sale and keeping with intent to sell may all alike be
" *prohibited by the Legislature, if in their judgment the pro-*
" *tection of the public from injury or fraud require it. To*
" *deny the authority of the Legislature to do so is to attack all*
" *that is vital in the police power. To refuse recognition of*
" *the power in a given case because in the judgment of some*
" *the Legislature, though acting within its proper sphere, may*
" have mistaken the public necessity for a law prohibitory in
" its character, is to make the individual judgment superior
" to that of the Legislature to which the people in their sov-
" ereign capacity have delegated the law-making power.

" *The fact that the prohibited substance in a pure state may*
" *be wholesome and not injurious is irrelevant in a judicial*
" *inquiry. The wholesomeness will not render the act uncon-*
" *stitutional.* The statute is intended to prevent fraud and
" protect the public health *by prohibiting the manufacture*
" *and sale of substance and compounds which furnish the*
" *temptation to commit the former and which may be injurious*
" *to the latter.* As was said by the Supreme Court of Mis-
" souri in *State vs. Addington*, 77 *Mo.* 110, that to render
" the law unconstitutional the prohibited articles must be
" unwholesome would utterly overthrow the police power
" of the State—overthrow every law, the wisdom of which
" could not bear the test of scrutiny.

" In view of these and other considerations suggested in
" the opinion referred to, and also in that of the Court be-
" low, we cannot say the act in question is not a valid exer-
" cise of the police power of the State. *The Legislature was*
" *doubtless satisfied that the manufacture and sale* of the pro-
" hibited articles were prejudicial to the public good to such
" a degree that a remedy was needed ; and we have no right
" to say that a penal statute less severe and sweeping in its
" terms would have afforded an effective remedy. That is a
" legislative and not a judicial question. If it is thought

> " the Legislature erred in the solution of that question the " proper course is an appeal to them to correct the error, if " any there was."

The decision then is rested on the police power of the State, for while what is called *the sovereign power* is hinted at, no stress is laid upon it. This police power belongs to the legislative department and the question involved of whether the act as a fact is an exercise of the police power—that is, as a fact, touches or concerns the public health or morals—is a legislative and not a judicial one.

The proof offered that the article sold instead of its being in the least injurious to the individual or the public is nutritious and healthful, is irrelevant. That dealing in it was a harmless, profitable occupation amounts to nothing.

In the case at bar, the Supreme Court of Pennsylvania ruled (page 28 of the Record in that case):

> " This case is ruled by *Powell vs. The Commonwealth*, 19 " *W. N. C.* 24, so far as the question of the police power of " the State is concerned we were of opinion then, as we are " now, that the legislature has the power to prohibit the " manufacture and sale of an article detrimental to the " public health. *Whether oleomargarine was such an article " was a question of fact and one which has been determined " by the Legislature. We are bound to presume that it was " done upon sufficient evidence.*"

It is therefore the law in Pennsylvania that whether or no any given act is within the police power of the State is one which the Judiciary canno' determine but it rests wholly with the Legislature to define its own powers in reference thereto, for if the Legislature is the body which *finally* passes on the fact as to whether any given substance or thing is "detrimental to the public health," and when once this is decided the Courts are powerless to re-examine the question, *therefore* and *necessarily* the Legislature is supreme and there is no power anywhere to restrain them.

There is absolutely nothing then in this case which affirmatively shows that the State Act has any real or substantial relation to the public health, peace, good order or morals, except that the Supreme Court of Pennsylvania said they would *presume* it had because—*and only because*—the Legislature passed the Act, (though we offered as a fact to prove it had not) and the following sentence from the opinion of the Court (page 30):

> " The Statute is intended to prevent fraud and protect the " public health by prohibiting the manufacture and sale of „ substances and compounds which furnish the temptation to " commit the former and which may be injurious to the " latter."

> (*a*) " To prevent fraud * * * by prohibiting the " manufacture and sale of substances and compounds which " furnish the *temptation* to commit the former (fraud)."

Any business then which "furnishes the temptation" to commit fraud may be prohibited according to this.

If so, as the banking business, all commercial enterprises of all kinds, the dairy business—particularly the manufacture and sale of bread and all the multiplied food products, and all branches of agriculture—do undoubtedly furnish *great temptation* to commit fraud, the Legislature may of its own motion prohibit them all and the citizen of Pennsylvania is as much a slave to the Legislature as the lowest peasant is to the Czar of all the Russias —he holds his liberty and property at their beck and nod.

The people of the State said in their Constitution:

> " That the general great and essential principles of *liberty* " and free government may be recognized and *unalterably* " *established, we declare,*

> (1) " That all men are born equally free and independent " and have certain *inherent* and *indefeasible* rights, among which

" are those of enjoying and defending life and liberty, of
" *acquiring, possessing* and protecting property and reputa-
" tion, and of pursuing their own happiness,"

And then was added, for the protection of these rights, that they

" Are excepted out of the general powers of government
" and shall forever remain inviolate."

Under this decision, what practical benefit are all these provisions? By whom are they to be enforced? How is the citizen to be given the benefit of them?

(*b*) " And which *may be* injurious to health"—not are—
" *may be.*"

How will the citizen when his liberty is invaded and property taken prove it is not injurious to health. It is a fact capable of proof. Why may he not then prove it as any other fact? And if he once proves, as we offered to do, that it is not injurious to health, what becomes of the " may be."

The trial Court said that you could not introduce the proof of facts, and upon the finding of a jury one way or another, have the constitutionality of the law decided. And yet, the Supreme Court had directly affirmed and sanctioned that very practice.

Seely vs. City of Pittsburgh, 82 *Pa. St.*, 360.
Washington Avenue, 69 *Pa. St.*, 352.
Craig vs. Philadelphia, 89 *Pa. St.*, 265.

(II) Under the settled doctrine of this Court, however, whether a State Statute called a Police Law has a real or substantial relation to the public health, peace or morals is a judicial question and if it is found that it has not, but is an invasion of rights secured by the Federal Constitution, this Court will declare it void.

In the *Slaughter House case*, 16 *Wallace* 87, Mr. Justice Field, said:— * * * * * * *

> " Under the pretense of prescribing a police regulation the
> " State cannot be permitted to encroach upon any of the just
> " rights of the citizens which the constitution intended to
> " secure against abridgement."

In the same case, page 114, Mr. Justice Bradley said:—

> " The right of a state to regulate the conduct of its citizens
> " is undoubtedly a very broad and extensive one, and not to
> " be lightly restricted. But there are certain fundamental
> " rights which this right of regulation cannot infringe. It
> " may prescribe the manner of their exercise but it cannot
> " subvert the rights themselves."

In *Munn vs. Illinois* 94, *U. S.* 145, Justices Strong and Field, concurred in saying:—

> " The power of the State over the property of the citizen
> " under the constitutional guaranty is well defined. * *
>
> " The doctrine that each one must so use his own so as not
> " to injure his neighbor, *sic utere tuo ut alienum non lædas*
> " is the rule by which every member of society must possess
> " and enjoy his property, * * Except in cases where
> " property may be destroyed to arrest a conflagration or the
> " ravages of pestilence, or be taken under the pressure of an
> " immediate and overwhelming necessity to prevent a public
> " calamity the power of the State over the property of the
> " citizen does not extend beyond such limits." * * *
>
> " Whatever affects the peace, good order, morals and
> " health of the community comes within its scope; and every
> " one must use and enjoy his property subject to the restrictions
> " which such legislation imposes. *What is termed the police*
> " *power of the State, which from the language often used*

"*respecting it, one would suppose to be an undefined and*
"*irresponsible element in government, can only interfere with*
"*the conduct of individuals in their intercourse with each other,*
"*and in the use of their property, so far as may be required*
"*to secure these objects.*"

In the very latest case, the Kansas Prohibition cases, this Court said:—

"But by whom, or by what authority, is it to be determined
"whether the manufacture of particular articles of drink,
"either for general use or for personal use of the maker, will
"injuriously affect the public? Power to determine such

"questions, so as to bind all, must exist somewhere; else
"society will be at the mercy of the few, who, regarding only
"their own appetites or passions, may be willing to imperil
"the peace and security of the many provided only they
"are permitted to do as they please. Under our system that
"power is lodged with the legislative branch of the govern-
"ment. It belongs to that department to exert what are
"known as the police powers of the State, and to determine,
"primarily, what measures are appropriate or needful for the
"protection of the public morals, the public health, or the
"public safety.

"It does not at all follow that every statute enacted
"ostensibly for the promotion of these ends, is to be accepted
"as a legitimate exertion of the police powers of the State.
"There are, of necessity, limits beyond which legislation
"cannot rightfully go. While every possible presumption
"is to be indulged in favor of the validity of a statute,
"(*Sinking Fund Cases*, 99 *U. S.*, 718,) the courts must
"obey the constitution rather than the law-making depart-
"ment of government, and must, upon their own respons-
"ibility, determine whether, in any particular case, these
"limits have been passed. 'To what purpose,' it was said
"in *Marbury vs. Madison, Cranch*, 137, 167, 'are powers

" limited, and to what purpose is that limitation committed
" to writing, if these limits may, at any time, be passed by
" those intended to be restrained? The distinction between
" a government with limited and unlimited powers is
" abolished, if those limits do not confine the persons on whom
" they are imposed, and if Acts prohibited and Acts allowed
" are of equal obligation.' "

" The courts are not bound by mere forms, nor are they to
" be misled by mere pretenses. They are at liberty—indeed,
" are under a solemn duty—to look at the substance of things,
" whenever they enter upon the inquiry whether the legis-
" lature has transcended the limits of its authority.

" If, therefore, a statute purporting to have been enacted
" to protect the public health, the public morals, or the public
" safety, has no real or substantial relation to those objects,
" or is a palpable invasion of rights secured by the fund-
" amental law, it is the duty of the courts to so adjudge, and
" thereby give effect to the constitution."

People vs. Marx, 99 *New York*, 377.
Tenement House Cigar Case, 98 *New York*, 98.

" As a general proposition, it may be stated, it is in the
" province of the law-making power to determine whether
" the exigencies exist calling into exercise this (police)
" power.

" What are the *subjects* of its exercise is *clearly a judicial*
" *question.*"

Town of Lakeview vs. Rose Hill Co., 70 *Illinois*, 191.

In *Cooley's Constitutional Limitations*, 4th ed., page 719, the law is stated as follows:

"The limit of the exercise of the police power in these
" cases must be this; the regulations must be in reference to
" the comfort, safety and welfare of society; they must not be

"in conflict with any of the provisions of the charter, and "they must not under pretense of regulation take from the "corporation any of the essential rights which the charter "confers. In short, they must be police regulations in fact "and not amendments of the charter in curtailment or cor- "porate franchises."

In *Potter's Dwarris on Statutes*, page 458, the law is thus stated:

"The limit to the exercise of the police power can only be "this: the legislation must have reference to the comfort, the "safety or the welfare of society; it must not conflict with "the provisions of the constitution."

In *Austin vs. Murray* 16, *Pickering* 121, 126, the Supreme Court of Massachusetts said:

"The law will not allow the rights of property to be in- "vaded under the guise of a police regulation for the promo- "tion of health, when it is manifest that such is not the ob- "ject and purpose of the regulation."

In *Watertown vs. Mayo* 109, *Mass.* 315, 319, same Court said:

"The law will not allow rights of property to be invaded "under the guise of a police regulation for the preservation "of health or protection against a threatened nuisance; and "when it appears that such is not the real object and pur- "pose of the regulation the Courts will interfere to protect "the rights of citizens."

That all laws passed by the legislature are subject to review by the Courts to determine whether they are within the legislative power, and also whether they conflict with any constitutional restrictions.

See *McCullough vs. Maryland* 4, *Wheaton* 316, 421; *Hepburn vs. Griswold* 8, *Wallace* 603; *Legal Tender Cases* 12, *Wallace* 457; *Marbury vs. Madison* 1*st*, *Cranch* 137.

> Aside from decided cases this point of law must be true. Suppose that a statute of Pennsylvania gives "A's" property to "B" and Pennsylvania calls it a police law, and such act is brought here for review on the ground that it does not fall within the police power but is a flagrant violation of the provisions of the 14th amendment: Is it a satisfactory answer for this Court to have Pennsylvania say, but you cannot institute such an inquiry. The General Assembly of our State is the ultimate power and *if it* determines this act to be an exercise of the police power and necessary for the public health or morals the Courts (in language of the Pennsylvania Supreme Court,) "*are bound to presume*" such are the facts.

That is, although the 14th amendment prohibited any State from denying to any one the equal protection of its law and depriving any one of life, liberty, or property without due process of law yet these constitutional restrictions really in the end depend on the form or manner of State Legislation. If the State dubs the Act attacked a police law and its General Assembly says it is to protect the public health or morals, that concludes the question and the courts are powerless to examine it.

This is utterly subversive of the constitutional prohibitions, contrary to the time honored judicial decisions that the fundamental law is placed in care of the courts and whenever the legislative department infringes any of its provisions the judiciary will declare such Act void. It is destructive of one of the most valuable protections to life, liberty or property.

The very purpose of the prohibitions in the 14th amendment was to prevent the State passing Acts which would deprive the individual of life, liberty or property without due process of law, but if each State can itself determine when such Act does or does not violate such prohibition, *cui bono,* the restriction?

In all other branches of legislative action the courts inquire of and test the legality of their acts by the constitution. Why should the police power be an exception? Where in any of the

reserved rights of the people or in any of the constitutional provisions is it said that life, liberty and property are all subject to any Legislative Act which is called a Police power?

To affirm the broad doctrine of the Supreme Court of Pennsylvania is to place a large mass of legislation at the discretion of the legislature without any limit and freed from the restraining influences of the constitution, and to adopt such a rule for cases arising under the 14th amendment would be to render its beneficient provisions practically worthless.

(3.) *Oleomargarine butter is not injurious to the public health, morals or safety, and therefore its manufacture and sale cannot be prohibited under the guise of the police laws.*

We have seen under the preceding head that this Court will determine whether, or not, any given law of the State, including so-called police laws, are in conflict with the Federal Constitution. To do this it becomes necessary to determine primarily what the police power is, and in what way, if at all, oleomargarine butter offends the public health, morals or peace.

It is admitted that the police power of the State is a general supervisory power intended to promote the public health, peace, safety and morals. This Court in the *Slaughter House cases* 16*th* Wallace 62, defined it as follows:

> "Unwholesome trades, slaughter-house operations offen-
> "sive to the senses, the deposit of powder, the application of
> "steam-power to propel cars, the building with combustible
> "materials, and the burial of the dead may, says Chancellor
> "Kent, be interdicted by law in the midst of dense masses of
> "population on the general and rational principle that every
> "person ought so to use his property as not to injure his
> "neighbors, and that private interests must be made subservi-
> "ent to the general interests of the community. This is called
> "the police power; and it is declared by Chief Justice Shaw
> "that it is much easier to present and realize the existence and

"sources of it than to mark its boundaries or prescribe the "limits of its exercise. This power is and must be, from its "very nature, incapable of any very exact definition or limi- "tation. On it depends the security for social order, the "health and life of the citizen, the comfort of an existence in "a thickly populated community, the enjoyment of private "and social life and the beneficent uses of property. It ex- "tends, says another eminent Judge, to the protection of lives, "limbs, health, comfort and quiet of all persons and the pro- "tection of all property within the State; and persons and "property are subjected to all kinds of restraints and bur- "dens in order to secure the general comfort, health and pros- "perity of the State."

So in the *Beer Company vs. Massachusetts* 97 *U. S.* 33, this Court again said:

"Whatever difference of opinion may exist as to the ex- "tent and boundaries of the police power, and however diffi- "cult it may be to render a satisfactory definition of it, there "seems to be no doubt that it extends to the protection of "the lives, health and property of the citizens and to the pres- "ervation of good order and the public morals."

The police power springs from and is based upon the doctrine or maxim, *Sic utere tuo ut alienum non lædas.*

Cooley's Constitutional Limitations, Star page 574. *Fertilizing Co. vs. Hyde Park* 97 *U. S.* 667.

In *Munn vs. Illinois,* 94 *U. S.* 145, Justices Strong and Field agreed that:

"The power of the State over the property of the citizen "under the constitutional guaranty is well defined. * * * "The doctrine that each one must so use his own, so as not to "injure his neighbor—*sic utere tuo ut alienum non laedas*— "is the rule by which every member of society must possess "and enjoy his property. * * * Except in cases where

"property may be destroyed to arrest a conflagration or the "ravages of pestilence, or be taken under the pressure of an "immediate and overwhelming necessity to prevent a public "calamity, the power of the State over the property of the "citizen does not extend beyond such limits." * * *

It would be useless to multiply citations on this question, and if additional authorities are required, reference is made to those cited in the cases named.

As seen it has for its objects the preservation of the public health, morals, peace and good order.

The law of Pennsylvania in question, approved May 21, 1885, is entitled "An Act for the protection of the public health and to prevent the adulteration of dairy products and fraud in the sale thereof."

According to this title the objects of the legislation then are (*a*) to protect the public health, (*b*) to prevent the adulteration of dairy products, (*c*) fraud in the sale thereof.

They all relate, however, to the public health, because the dairy products are articles of food.

How utterly useless this act would be in the prevention of the adulteration of Oleomargarine butter and fraud in the sale thereof, and how utterly misleading its entire title is, will be shown hereafter, but for the present it is assumed that it is an Act purporting to be in reference to the public health. If as a fact Oleomargarine butter is injurious to the public health, then it does come within the police power.

Admittedly the manufacture and sale of liquor does affect the public health and morals and the safety and good order of society, and therefore its regulation and control is admittedly within the police power of the State.

This Court has repeatedly said that it could not affect to be ignorant of the well-known fact that the manufacture and sale of

liquor does affect the public morals, health and peace. All the past and all the present bear abundant proof of that. The records of our Criminal Courts, of our public and private hospitals, of our jails and all our reformatory institutions, furnish abundant proof of it. Nay more, the public press teems with the saddest of crimes and suicides and heart-rending incidents traced to their source in the excessive use of liquor.

This knowledge of its effect crowded in upon you and every decision affirming that the regulation or prohibition of the traffic was within the police power of the several States was based on these well-known facts.

We need only refer to the last decision of this Court in the Kansas Prohibition cases, opinion by Mr. Justice Harlan, where the cases were reviewed and the doctrine affirmatively stated.

(Just here it may be said, that if this Court took judicial notice or informed itself as to liquor, why may it not do likewise as to oleomargarine butter?)

But the manufacture or sale or use of oleomargarine butter cannot be classed with liquor. It is separate and apart from it, and is as independent of and freed from the reasons which places liquor under the police laws, as is the purest and choicest wheat, bread and pure water. To demonstrate this the Plaintiffs in error in this case offered to prove in the Court below (page 12) that the article sold to the prosecuting witness was manufactured in the presence of the witness on the stand; that it was made from pure animal fats; that the process of manufacture was clean and wholesome; that the article contains the same elements as dairy butter; that the only difference between them is that the manufactured article contains a smaller proportion of the fatty substance known as butterine; that this butterine exists in dairy butter in the proportion of from three to seven per cent., and in the manufactured article in a smaller proportion, and was increased in the manufactured article by the introduction of milk and cream; that this having been done the article contains

all the elements of butter produced from pure unadulterated milk or cream from the same, except that the percentage of butterine is slightly smaller; that the only effect of butterine is to give flavor to the butter and has nothing whatever to do with its wholesomeness; that the oleaginous substances in the manufactured article are substantially identical with those produced from milk or cream; that the article sold by the Defendants to the prosecuting witness was a wholesome and nutritious article of food and in all respects as wholesome and healthful as butter produced from pure unadulterated milk or cream from the same.

In the consideration of this case, this Court will assume this proof could have been made.—*Scotland County vs. Hill*, 112 *U. S.* 186.

The case of the Commonwealth in the Court below was (page 8):

"That the Defendants sold in Allegheny county, Pennsylvania, on the 2d day of February, 1887, as an article for food, to S. J. Adamson, the prosecuting witness in this case, one original package of an article manufactured in Allegheny county, Pennsylvania, by the Defendants, out of oleaginous substances and compounds, other than that produced from unadulterated milk or cream from the same and designed to take the place of butter produced from unadulterated milk or cream; that the said package was bought and sold as oleomargarine or butterine and not as butter produced from unadulterated milk or cream from the same; that the said Defendants had in their possession, with intent to sell the same as an article of food, the said package; and that the said package when sold was marked with the words, 'oleomargarine butter' upon the lid and side of the package, in a straight line in Roman letters, one half an inch long, as provided by an Act of General Assembly of this State, entitled "An Act for the protection of dairymen and to prevent deception in the sales of butter and cheese, approved May 24th, 1883."

There was no evidence of any kind given to show that oleomargarine butter was in any shape, manner or form injurious to

the public health. There was no evidence of any kind to show any fraud practised by the Plaintiffs in Error in the manufacture or sale of oleomargarine butter, but on the contrary, the case of the State admitted that the article was bought and sold as oleomargarine butter, and that it was stamped "Oleomargarine Butter."

In no shape, manner or form was it shown how oleomargarine butter could in any way harm any one, or how making it or having it for sale or selling it could injure any one. Especially was there an entire absence of proof to even suggest how oleomargarine butter could affect the public health *just when* and *only when* it was in *competition* with dairy butter, but was harmless if used as a substitute for aught else.

The Act in question does not say that oleomargarine butter is unwholesome, or in any way injurious to the public health, or morals, or peace.

Its title, "To protect the public health," may refer solely to the use of impure milk in making dairy butter.

There is nothing in any way or of any kind to show that oleomargarine butter does affect the public health, or peace, or good order.

The fact that oleomargarine butter is most extensively used in the country at large and of what it is made and what its ingredients are and whether wholesome or not, would seem to be matters of which this Court will inform itself.

Brown, et al, vs. Piper, 91 *U. S.*, 42.

The report of the Commissioners of Internal Revenue for the fiscal year, ending June 30, 1887, contains on page CXLIV to page CLIII, an extended examination of oleomargarine butter from a scientific standpoint, and the following is an extract from page CLII:—

"The wholesomeness of artificial butter has been affirmed "by eminent chemists and physiologists, both in Europe and "in this country, who have devoted attention to this subject, "when it is prepared from carefully selected and sweet fat of "healthy animals, and the process conducted in a proper and "cleanly manner. (See in this connection the statements of "Dr. C. F. Chandler, of the School of Mines, Columbia "College, New York; Prof. Henry Morton, Stevens "Institute, Hoboken, N. J.; Prof. G. F. Barker, University "of Pennsylvania, Philadelphia; Prof. G. C Caldwell, "Cornell University, Ithaca, N. Y.; Prof. S. W. Johnson, "Sheffield, Scientific School, Yale College, New Haven, "Conn.; Dr. J. W. S. Arnold, University Physiological "Laboratory, New York; submitted to the Senate Com- "mittee Agriculture and Forestry, and by Sir F. A. Abel, "Mr. Herbert P. Thomas, Mr. A. H. Allen, President of "the Society of Public Analysts; Mr. Otto Hehner, "Secretary of the Society of Public Analysists; Dr. James "Bell, principal analyzer to the Commissioners of Inland "Revenue, and others before the English Committee.)"

The case is then free from all elements of fraud.

Oleomargarine butter is an article whose use does not injuriously affect the public health, or morals, or peace, or good order.

It is a healthful, wholesome and nutritious article of food in no way injurious to the public health, morals or peace.

So this record stands. So the Supreme Court of Pennsylvania assumed it to be when it said that this fact is irrelevant and immaterial.

So all the Standard Scientific Works will show.

If oleomargarine butter be such an article; if it is wholesome and pure, and its use does not, in any way, affect the public health, may the legislature of the State, under the pretense of the police power, prohibit its manufacture, or sale, or possession with the intent to sell?

If it be said the legislature may so interfere, we respectfully ask upon what grounds can such an interference be justified? Acts passed under the police power should have some relation to the public health, peace, good order, or morals.

As was said in the Kansas Prohibition cases such laws must have some *real and substantial relation* to the *public health, morals,* or *good order.*

> "A law enacted in the exercise of the police power, must "in fact be a police law. If it be a law for the promotion "of the public health, it must be a health law having some "relation to the public health."

In Re Jacobs 98, *N. Y.* 112.

> "But acts which can only be justified on the ground that "they are police regulations, must be so clearly necessary to "the safety, comfort or well being of society, or so imper-"atively required by the public necessity that they must be "taken to be impliedly excepted from the words of the con-"stitutional prohibition."

2 *Kent's Com.* * 340, *note* 2, (13*th ed.*)
State vs. Noyes, 47 *Maine,* 189.
People vs. Jackson and M. P. R. Co., 9 *Michigan,* 307.

If the legislature pass an Act entitled, "An Act to protect the public health and morals," and the substance of the Act was to give "A's" property to "B," could it be pretended that this was a lawful exercise of the police power of the State?

While it is not denied that the police power is part of the legislative functions of the government and that in cases falling legitimately within its scope, legislative discretion may be exercised as to the reasonable extent of the penalty, it is denied that the legislature can bring any given article within the police power, merely by passing an Act of Assembly and saying that it does affect the public health, or peace, or good order, or morals.

Primarily all the Acts of the legislature are valid. The Courts so presume. Because of this *primarily* a police law is valid. But this is *primae facie* only. If from an analysis of the Act or from proof offered, or by the Court acquainting itself with the facts, it is shown the Act has no real or substantial relation to the public health, peace, or morals, it is not a valid exercise of the police power.

If in any definite and satisfactory way, as by an offer as was made in this case on a judicial trial, or from information gained directly by this Court, it appears that the thing sought to be brought within the police power, is not as a fact within it; that is if the legislature pretend to prohibit the sale of an article as deleterious to health, when as a fact it is not deleterious to health, and this plainly and legitimately appears, and there is even no dispute in reference to it, then it would be the duty of the Courts to say that it was not a legitimate exercise of the police power.

As was said by the Court of Appeals of the State of New York in the matter of *Jacobs* 98 *New York, page* 115:—

> "When a health law is challenged in the Courts as
> "unconstitutional, on the ground that it arbitrarily interferes
> "with personal liberty and private property without due
> "process of law, the Courts must be able to see that it
> "*has in fact some relation to the public health, that the public*
> "*health is the end actually aimed at, and that it is appropriate*
> "*and adapted to the end.*"

As this Court in the Kansas Prohibition cases, after premising that the police power belonged to the legislative department of government, said:—

> "It belonged to that department to exert what are known
> "as the police powers of the State, and to determine primarily
> "what measures are appropriate or needful for the protection
> "of the public morals, the public health or the public safety.
> "*It does not at all follow that every statute enacted ostensibly for*
> "*the promotion of these ends, is to be accepted as a legitimate*

" *exercise of the police powers of the State.* There are of neces-
" sity limits beyond which legislation cannot rightfully go.

" While every possible presumption is to be indulged in
" favor of the validity of a statute (*Sinking Fund cases* 99,
" *U. S.* 718) the courts must obey the Constitution rather
" than the law-making department of government, and must
" upon their responsibility determine whether, in any par-
" ticular case, these limits have been passed. 'To what pur-
" pose,' it was said in *Marbury vs. Madison* 1, *Cranch* 137,
" 167, are powers limited, and to what purpose is that limi-
" tation committed to writing if these limits may, at any
" time, be passed by those intended to be restrained? The
" distinction between government with limited and unlim-
" ited powers is abolished, if those limits do not confine the
" persons on whom they are imposed, and if acts prohibited
" and acts allowed are of equal obligation. The Courts are
" not bound by mere form nor are they to be misled by
" mere pretenses. They are at liberty, indeed are under a
" solemn duty, to look at the substance of things whenever
" they enter upon the inquiry whether the legislature has
" transcended the limits of its authority.

" *If, therefore, a statute purporting to have been enacted to*
" *protect the public health, the public morals or the public*
" *safety, has no real or substantial relation to those objects,* or
" is a palpable invasion of the rights secured by the funda-
" mental law, it becomes the duty of the Courts to so ad-
" judge and thereby give effect to the Constitution."

It is not intended to deny that the Legislature of the State may protect the adulteration of all food products. It may prevent the adulteration of wheat flour. It may regulate the adulteration of wheat or rye bread, of molasses, sugar, rye, salt, pepper and all the articles of food which are used to sustain life. So it may regulate the adulteration of oleomargarine butter and milk, and undoubtedly it may prohibit the adulteration of milk

by the introduction of water and we find no fault with the decision of the Supreme Court of Massachusetts, (*Commonwealth vs. Farron*, 91, *Mass.* 489), referred to in the opinion of the Court in this case, sustaining an act prohibiting the adulteration of milk by the introduction of water. This was purely a case of adulteration or weakening of a dairy product useful and beneficial to human life. But the Supreme Court of Massachusetts did not hold that the legislature might entirely prohibit the sale of pure milk or pure water.

It is one thing to regulate the adulteration of an article, or to prevent fraud in the manufacture or sale thereof, and quite another thing to absolutely prohibit the manufacture or sale of the article itself.

We have no controversy with the decision in the *Slaughter House Cases*, 16 *Wallace* 36, nor in *Patterson vs. Kentucky*, 97 *U. S.*, 502, nor kindred cases.

The police power is exceedingly broad and does cover all unwholesome trades—slaughter houses—burial of the dead amidst dense population—deposit of powder, etc., etc., (page 62 of that case.) But all these have a direct and substantial relation to the public health, morals, safety, peace or good order. This is manifestly so, and the Court will take judicial notice of it.

But the new doctrine that the legislature of a State may, of its own motion, prohibit the manufacture and sale of a harmless and wholesome article of food, and do this under the guise of the police power, though the facts are, the prohibited article in no way offends the public morals, health, peace, good order or comforts, is we submit for the first time advanced in this Court.

Is it possible that the legislature of Pennsylvania, or of any other State in the Union, may prohibit the manufacture and sale of wheat flour and wheat bread, or rye bread, or dairy butter, or sugar, or cream, or milk, or any of the articles of food which are necessary to sustain human life. May they indeed prohibit the sale of water or milk in its pure state?

Is not the question answered by the asking of it, that such an Act would be depriving the citizen of his liberty and in many cases property, and indeed in some cases life, without due process of law.

But if such a prohibition is unconstitutional as to wheat bread, or rye bread, or flour, or any wholesome or nutritious article of food which the citizens of the State use, by what mode of reasoning can the constitutionality of an Act such as the one in question be sustained when the facts as they now appear to this Court show that oleomargarine butter is just as healthful an article of food as wheat flour, or bread, or rye, or milk, or dairy butter?

If it is not within the police power to prohibit the sale of wheat bread and rye bread, milk and cream, and dairy butter, etc., how can it be within the police power to prohibit the sale of an article equally wholesome?

There is not an article of food that we eat that may not be and which probably is not, at some time or by some person adulterated. But because this is so may all honest dealers be prevented from making or selling a pure, honest article because some dishonest ones adulterate?

Is the honest baker to lose his occupation and property because a dishonest one adulterates bread? If so, truly the law punishes the innocent. The many honest suffer for the few dishonest, and the baker holds his liberty and property subject to be taken from him *because*—and *only because*—a man he never knew or helped to be dishonest adulterates bread. Surely this cannot be. Federal constitutional restrictions are not so futile and useless.

We invite the fullest investigation as to what oleomargarine butter is? Whether it is wholesome, or not. How it is made? What its ingredients are? How this Court will do this, is a matter within its discretion.

Brown vs. Piper, 91 *U. S.*, 42.

We admit to the fullest extent that the police power may prevent adulterations and may prevent fraud, yet, an examination of the Act in this case will show that there is not a syllable in the Act in any way calculated to prevent fraud in the sale of or to prevent the adulteration of oleomargarine butter. It is simply and solely aimed at the extinction of the oleomargarine traffic, and if the Act was enforced to its fullest extent it could in no shape, manner or form prevent fraud in or prevent the adulteration of oleomargarine. This Court will look at the substance of the Act and will not be deceived merely by the pretence in the title.

We therefore submit, that this Pennsylvania Act which prohibits the manufacture and sale of oleomargarine is not a valid exercise of the police power of the State.

But if it is not, is it in conflict with any of the provisions of the Federal Constitution, and we reply that it is in conflict with the 14th amendment to the Federal Constitution, which is as follows:

> "All persons born or naturalized in the United States and "subject to the jurisdiction thereof, are citizens of the United "States, and of the State wherein they reside. No State "shall make or enforce any law which shall abridge the "privileges or the immunities of the citizens of the United "States; nor shall any State deprive any person of life, "liberty or property without due process of law, nor deny "to any person within its jurisdiction the equal protection of "the law."

The Act of May 21, 1885, *is in conflict with this amendment in the following particulars:*

(IV.) *In that it denies to the Plaintiffs in Error, persons within the jurisdiction of the State of Pennsylvania, the equal protection of the laws of the State.*

The title and the first section of the Act of May 21, 1885, are as follows:

"An Act for the protection of the public health and to "prevent adulteration of dairy products and fraud in the sale "thereof."

"SECTION 1. Be it enacted, &c., That no person, firm or "corporate body shall manufacture out of any oleaginous "substances or compounds of the same, other than that pro- "duced from unadulterated milk or of cream from the same, "any article *designed to take the place of butter or cheese* pro- "duced from pure unadulterated milk or of cream from the "same, or of any imitation or adulterated butter or cheese; nor "shall sell or offer for sale or have in his, her or their posses- "sion with intent to sell the same as an article of food."

The title of this Act says the Act is

(A,) To protect the public health, (B) to prevent adulteration of dairy products, and (C) fraud in the sale of dairy products.

The first section contains the legislative prohibition. It denies the right of all persons to manufacture or sell, or offer for sale, or have in their possession with the intent to sell any article "manufactured out of oleaginous substances or compounds of the same other than that produced from unadulterated milk or of cream from the same any article *designed to take the place* of butter or cheese produced from pure unadulterated milk or of cream from the same."

It does not prohibit the manufacture or sale of the same oleaginous compounds, *provided*, such a compound could be used for *any other purpose than as a substitute for butter or cheese.* If the compound or oleaginous substance could be used as a substitute for meat, or bread, or sugar or coffee, or lard the Act does not prohibit its manufacture or sale.

It prohibits the manufacture or sale when, and only when, in the words of the Act it is "*designed to take the place of* butter or

cheese produced from pure unadulterated milk or of cream from the same."

It is legislation which strikes down and prevents the manufacture and sale of an article which on the market may be used as a substitute for another food product, when, and just when, and not until, the product IS DESIGNED to take the place of dairy butter and to be used as a substitute for it, its manufacture or sale, or having in possession with intent to sell becomes a crime and is prohibited by the Act.

This legislation then prohibits all persons engaged in the manufacture or sale of Oleomargarine butter, from engaging in it, or offering the Oleomargarine butter for sale, or selling it as a substitute for dairy butter.

This analysis of the Act seems clearly to demonstrate the following propositions:

(A.) That the title of the Act is false and misleading so far as this case is concerned, when it says it is to protect the public health.

Oleomargarine butter is a food product. It is or it is not deleterious to the public health as such product. The other food product with which it competes and instead of which it is used cannot change the nature or effect upon health of Oleomargarine butter. If the manufacture and sale, or having for sale, Oleomargarine butter as a substitute for beef, or lard, or bread, would not affect the public health, how is it possible that the purpose for which it is offered for sale can determine the question of its healthfulness? However sold, or for whatever purpose it is to be used by the citizens, it is a food product and intended as an article of food. If it is sold as a substitute for bread or meat, then, according to the Act, it is not illegal or unwholesome. If it is sold as a substitute for butter, it is illegal and unwholesome. If the Legislature of the State cannot make black white, nor day night, surely it cannot, by mere legislative declaration, effect such a change as this. It surely does not protect the public health *merely* to pre-

vent the sale of one wholesome article *only* when it is designed to take the place of one other article of food with which it competes.

(B.) In no shape or form does the Act prevent the adulteration of Oleomargarine butter.

It is not aimed against the adulteration of Oleomargarine. When in its title it says, *the purpose of the Act is, among other things, to prevent the adulteration of dairy products,* it states that which the words of the Act shows to be false so far as Oleomargarine is concerned.

(C.) Nor does the Act in any way provide means to prevent fraud in the sale of Oleomargarine.

When the title of the act says that one of its purposes *is to prevent fraud in the sale thereof,* it states again that which the letter of the Act proves to be untrue so far as Oleomargarine is concerned.

In so far as the Act prevents the adulteration of milk or cream used in the making of butter we have no contention with it, but the fact that the same Act which merely prevents *the adulteration* of dairy butter, *absolutely prevents the manufacture or sale* of its substitute, Oleomargarine butter, points and emphasizes the truth of our criticism of the Act.

Stripped of its pretenses and shown in its nakedness, this Act, then, is an Act favoring dairy butter and those engaged in its production and sale, at the expense of Oleomargarine butter and those engaged in its manufacture and sale.

When stated conversely, it is an Act prohibiting the manufacture and sale of Oleomargarine butter for the purpose of furthering the manufacture and sale of butter produced from milk or cream.

This plainly appears upon the face of the Act.

It really in truth and in fact has no relation to the public health, nor has it any relation to the prevention of fraud in the

sale of, or the adulteration of Oleomargarine. Its purpose is plainly to prevent the sale of Oleomargarne butter *because* and *only* because the purchaser takes it instead of the dairy butter—else why does the Act say it is only when it is designed to take the place of butter its sale is unlawful. There can be no pretense that Oleomargarine is unhealthy. The Act does not say it is. No proof was offered to show it is. The proof is just to the contrary.

What does the Fourteenth Amendment mean when it says that no State shall deny to any one the equal protection of its laws?

In *Ex parte, Virginia*, 100 *U. S.* 340, this Court held that where a colored man in Virginia was charged with the commission of a crime that he was entitled to a jury indifferently selected, or chosen without discrimination as to color and that an Act for the enforcement of the law providing for the summoning of the jury and excluding therefrom persons of color was in conflict with this clause of the Fourteenth Amendment in that it denied to him, the prisoner, the equal protection of the law within the Fourteenth Amendment. This Court said, (page 347) :

> "But the Constitutional Amendment was ordained for a "purpose. It was to secure *equal rights* to all persons and "to insure to all persons the enjoyment of such rights, power "was given to Congress to enforce its provisions by appro-"priate legislation."

To the same effect see *Strauder vs. West Virginia* 100 *U. S.* 303. *Virginia vs. Rives* 100 *U. S.* 313.

Neel vs. Delaware 103 *U. S.* 307.

In the Civil Rights cases, 109 *U. S.*, pages 23 and 24, Mr. Justice Bradley, delivering the opinion of the Court, said :

> "Many wrongs may be obnoxious to the prohibitions of "the Fourteenth Amendment which are not in any just sense

"incidents or elements of slavery. Such, for example, would "be the taking of private property without due process of "law; or allowing persons who have committed certain "crimes, (horse stealing, for example) to be seized and hung "by the *Posse Committatus* without regular trial; or deny- "ing to any person or class of persons the right to pursue "any peaceful avocation allowed to others. What is called "*class legislation would belong to this category and would be* "*obnoxious to the prohibition of the Fourteenth Amendment.*

* * * * * *

In *Yick Wo vs. Hopkins* 118 *U. S.* 356, this Court declared that an ordinance of the city of San Francisco which was so enforced that it discriminated against the subjects of the Emperor of China and in favor of the American citizen in carrying on the laundry business was in conflict with the Fourteenth Amendment and void. In that case on page 367 this Court approvingly cited the language already used in the case of *Barbier vs. Connoly* 112 *U. S.* 27, that the Fourteenth Amendment was:

"Undoubtedly intended not only that there should be no "arbitrary deprivation of life or liberty, or arbitrary spoli- "ation of property but that equal protection and secur- "ity should be given to all under like circumstances in "the enjoyment of their personal or civil rights; that all "persons should be equally entitled to pursue their happiness "acquire and enjoy property; that they should have like "access to the Courts of the country for the protection of "their persons and property, the prevention and redress of "wrongs and the enforcement of contracts; *that no impedi-* "*ment should be interposed to the pursuits of any one except as* "*applied to the same pursuits by others under like circum-* "*stances;* that no greater burdens should be laid upon one "than are laid upon others in the same calling and condition; "and that in the administration of criminal justice no differ- "ent or higher punishment should be imposed upon one than "such as is prescribed to all like offenses."

It was further said:

> "*Class legislation* discriminating against some and favor-
> "ing others is prohibited, but legislation which in carrying
> "out a public purpose is limited in its application if within
> "the sphere of its operation it affects alike all persons simi-
> "larly situated is not within the Amendment."

If then this Pennsylvania Act is "class legislation"—or if it substantially denies to those who trafficked in Oleomargarine butter the equal protection of the law with those who trafficked in dairy butter, it is in conflict with the Fourteenth Amendment. What are the facts?

There are two ways of making butter:

DAIRY BUTTER.

Hundreds of citizens were engaged in its manufacture by the process hereinbefore described, which (1) extracted from the cow her secretion called milk, and (2) artificially treated this milk to extract from it the oil which when (3) artificially treated and mixed with salt, arnatto, etc., resulted in the product called Dairy Butter. The choicest product was toothsome but expensive, and until its rival was made and sold it had practically no competition.

OLEOMARGARINE BUTTER.

Hundreds of citizens were engaged in its manufacture by the process described, which (1) took from the beef its fleshy fat and (2) artificially treated this until from it was extracted the oil which, when (3) treated as the oil extracted from milk resulted in the product called Oleomargarine Butter. It was substantially the same product as Dairy Butter, and equally wholesome, but not so pleasant to the taste as the choicest brands of Dairy Butter. It was much better than inferior grades of Dairy Butter, and was much cheaper. It was the only real competition Dairy Butter had.

As we have seen the State of Pennsylvania passed an Act by which, (1) it absolutely prohibited the manufacture or sale of oleomargarine butter when used or offered as a substitute for dairy butter and, (2) it in no way restricted the sale of dairy butter, but merely provided against its manufacture from impure milk or cream.

While the act protected the dealer in dairy butter from competition, it wholly prohibited all persons from making or selling oleomargarine butter, and this without any reason whatever except as appears from the face of the Act, because it was used as a substitute for dairy butter.

Is not this as decidedly class legislation as Yick Wo's case Does not the State of Pennsylvania deny to dealers in oleomargarine butter the right it secures to the dealers in dairy butter? Does it not protect and foster the industry of dairy butter, and strike down and prohibit the industry of oleomargarine butter? Is it not denying to dealers in oleomargarine butter the equal protection of the laws with the dealers in dairy butter? It is certainly not giving to dealers in oleomargarine butter the protection of equal laws? It deprives them of their business and occupation, and it does so on the face of the statute itself, *because, and only because* the product dealt in is "*designed to take the place of butter or cheese.*"

The 14th amendment says that a State shall not deny to any one the equal protection of its laws. Not merely the "protection," but the "equal" protection. To equally protect "A" with "B," "A" must not be discriminated against. The law which says to "B" you may manufacture and sell butter, but must not make it from adulterated milk, and which in the same section says to "A" you *must not* manufacture or sell oleomargarine butter in competition with dairy butter, does not bear equally on "A" and "B." It strikes down "A"'s business. It furthers and protects "B"'s, and this at "A"'s expense. This cannot be the equal protection spoken of in the constitution.

In the construction of the language: "Nor deny to any person within its jurisdiction the equal protection of the laws," its context should not be overlooked.

The whole paragraph is this:—

> "No State shall make or enforce any law which shall "abridge the privileges or immunities of the citizens of the "United States, nor shall any State deprive any person of "life, liberty, or property, without due process of law, *nor* "deny to any person within its jurisdiction the equal protec- "tion of the laws."

Now this clause as to *equal protection of the laws* immediately follows the clause protecting life, liberty and property and it is connected with it by the disjunctive "*nor*"—

The *equal protection* is broader than the protection of life, liberty, or property. A man possibly may be denied the equal protection of laws and yet not in a technical sense be deprived of his liberty, or property.

The denial is of the "*laws*" of the State. All of them. No system of legislation shall be adopted which shall operate or bear more harshly on "A" than on "B," unless indeed "A"'s own misconduct causes the difference.

Merely calling a law which denies the equal protection, "a police law" will not relieve it from the condemnation of the constitution.

In *Strauder vs. West. Virginia*, 100 *U. S.* 310, this Court said:—

"The 14th amendment makes no attempt to enumerate the rights it was designed to protect. It speaks in general terms and those are as comprehensive as possible. Its language is prohibitory but every prohibition implies the existence of the rights and immunities, prominent among which is an immunity from *inequality of legal protection*, either for life, liberty or property."

In *Barbier vs. Connoly*, 113 *U. S.*, 31:

"The 14th amendment in declaring that no State should deprive any one of life, liberty or property without due process of law, or deny to any one the equal protection of the law, undoubtedly intended that there should be no deprivation of life or liberty, or spoliation of property, but that *equal protection* should be given to all under like circumstances in the enjoyment of their personal and civil rights. * * * *That no impediment should be interposed to the pursuits of any except as applied to similar pursuits by others under like circumstances.*"

In *Boyd vs. United States*, 116 *U. S.*, 35:

"The rule is that constitutional provisions for the security of persons and property shall be liberally construed."

In the *Slaughter House cases*, 16*th Wallace, page* 97, Mr. Justice Field said:

> "That amongst the things which the citizen have of right
> " 'must be placed the right to pursue a lawful employment in a
> " lawful manner without other restraint than such as *equally*
> " *affects all persons.*'"

While it is not claimed that technically this Pennsylvania Act creates a monopoly, its tendency is toward that and this affords an additional reason why it is in conflict with the 14th amendment.

If it is once admitted that the police power will enable the legislature at its option to prohibit the manufacture and sale of a harmless, wholesome article of food, when it is designed to take the place of another wholesome article of food, it opens wide the door to the interference by legislation with commerce and trade in order that one industry may flourish at the expense of another.

Why may not the dealers in oleomargarine butter if they could procure sufficient influence, have passed an act to prohibit the

manufacture and sale of dairy butter; or the dealers in rye bread prohibit the making and sale of wheat bread; or the dealers in brown bread prohibit the making and sale of white bread; one kind of potatoes, or apples, or grapes, or peaches, or molasses, or sugar, or tea, or coffee, or tobacco, *et ad infinitum*, severally be protected by prohibiting the sale of anything to be used as their substitute.

The effect of such legislation is to strike at the independence and thrift of the individual and to change our theory of government; the personal liberty of the citizen, and his responsibility for his own success in life is weakened, and he becomes a member of a paternal government which makes or ruins him as no King or Queen in Europe has dared to do for one hundred years.

It is in conflict with the doctrine of equality before the law and is a denial of equal privileges to all.

See the *Slaughter House Cases*, 16 *Wallace* 62; *Charles River Bridge vs. Warren Bridge*, 11 *Peters*, 607; *Case of the Monopolies*, 11 *Report*, 84; *Cooley's Principles of Com. Law, page* 325; *Butchers' Union vs. Crescent City Co.*, 111 *U. S.* 746, 754, 761.

Nor should it be overlooked that if it is lawful for the legislature to so prohibit the manufacture or sale of any or all harmless food products, the further consequence follows, that the articles of food which the individual may eat are directly controlled by the State. The theory of our government is not paternal, but that the greatest freedom consistent with the public good should be given the citizen, and yet such legislation seems to greatly limit his freedom and only because others may have an exclusive market for a peculiar food.

We submit the Act of May 21st, 1885, most unequally affects the Plaintiffs in error and others engaged in the manufacture and sale of oleomargarine butter for the benefit of those engaged in the manufacture of dairy butter from milk or cream, and there-

fore is unconstitutional in that it denies to them the equal protection of the laws of Pennsylvania.

(IV) *The Act of May 21st, 1885, is also in conflict with the 14th amendment, because it deprives the Plaintiffs in error of their liberty without due process of law.*

What is the liberty which the constitutional amendment was intended to protect? There is no limitation of it. It is not merely absence of bodily restraint and freedom from incarceration, but "liberty" in its most comprehensive sense.

The primary definition of the word is given by Webster as follows: "The state of a freeman; ability to do as one pleases." It includes civil and political, and social and personal liberty.

Blackstone says, vol. 1, page 125:

"Civil liberty is that of a member of society and is no other than natural liberty so far restrained by human laws (and no further) as is necessary and expedient for the general advantage of the public."

In the case of the *Monopolies, 11th Coke, page* 4, it was said:

"All avocations, as well mechanical as otherwise, which prevents idleness (the bane of the Commonwealth) and exercises men and youth in labor for the maintenance of themselves and of their families and for the increase of their substance to serve the queen as occasion shall require, are profitable for the Commonwealth, and, therefore, the grant to the Plaintiff to have the sole making of them (playing cards) is against the common law and the benefit and labor of the subject."

In *Cooley on Constitutional Law, page* 225, the author says:

"Life and Liberty! These words are used in constitutional law as standing for and representing all personal rights whatsoever, except those which are embraced in the idea of property. The comprehensive word is "liberty" and by this is meant not

merely the freedom to move by unrestraint but such liberty of conduct, choice and action as the law gives and protects."

And again on page 231:

"The general rule is that every person *sui juris*, has a right to choose his own employment and to so fit his labor to any calling, or at his option to hire it out to the service of others. This is one of the highest of civil rights and any restrictions that discriminate against persons or classes are inadmissible."

In *Story on Constitutional Law, Cooley's edition, section* 1950, the author says:

"The word we employ to comprehend the whole is not, therefore, a mere shield to personal liberty, but to civil liberty, and to political liberty also, so far as it has been conferred and possessed. It would be absurd, for instance, to say that arbitrary arrests were forbidden, but that the freedom of speech, the freedom of religious worship, the right of self-defense against unlawful violence, the right freely to *buy and sell as others may*, or the right in the public schools found no protection here. * * * * The word on the other hand embraces all our liberties—personal, civil and political. None of them are to be taken away except in accordance with established principles; none can be forfeited, except upon the finding of legal cause after due inquiry."

In the *Slaughter House cases*, 16 *Wall.*, 116, Mr. Justice Bradley said:

"The rights to life, liberty and the pursuit of happiness are equivalent to the rights of life, liberty and property. * * * For the preservation, exercise and enjoyment of these rights the individual citizen as a necessity must be left free to adopt such calling, profession or trade as may seem to him most conducive to that end. Without this right he cannot be a freeman. This right to choose one's calling as an essential part of that liberty which it is the object of government to protect and the calling

when chosen is a man's property and right. Liberty and property are not protected when these rights are arbitrarily assailed."

In the same case, page 97, Mr. Justice Field said:

> "That amongst the things which the citizen has of right, must be placed the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons."

In the *Butchers' Union vs. The Crescent City Company*, 111 *U. S.*, 761, Justice Bradley, Harlan and Woods agreed that:

> "The right to follow any of the common occupations of life is an inalienable right."

Mr. Justice Field, in the same case, page 757, said: "The common business and callings of life, the ordinary trades and pursuits which are innocuous in themselves and have been followed in all communities from time immemorial, must therefore be free in this country to all alike upon the same conditions."

In *Munn vs. Illinois*, 94 *U. S.*, 142, Mr. Justice Strong and Field held that:

> "By the term 'liberty,' as used in the provision, something more is meant than mere freedom from physical restraint or the bonds of a prison. It means freedom to go where one may choose and to go in such a manner not inconsistent with the equal rights of others, as his judgment may dictate, for the promotion of his happiness; that is, to pursue such callings and avocations as may be most suitable to develop his capacities and to give to them their utmost enjoyment."

The New York Court of Appeals in *People vs. Marx*, 99 *New York* 386, states:

> "These constitutional safeguards have been so thoroughly discussed in recent cases that it would be superfluous to do

more than refer to the conclusions which have been reached bearing upon the question now under consideration. None of these propositions is now more firmly established than that it is one of the fundamental rights and privileges of every American citizen to adopt and follow such lawful industrial pursuits not injurious to the community as he may see fit. * * * The term 'liberty' as protected by the Constitution is not cramped into a mere freedom from physical restraint of the person of the citizen, and incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare."

It will be noticed that this liberty of the citizen is not only his right to continue in any trade, occupation or profession he has chosen, but also *to choose* such trade, occupation or profession which he prefers. Whenever any given act denies this to him, and does so without cause, it deprives him of the liberty of choice, which the cases cited show is one of the things which by the 14th amendment he cannot be deprived of, except by due process of law.

The Plaintiffs in error, as they offered to prove, had, prior to the 21st day of May, 1885, chosen as their occupation in life the business of the manufacture and sale of oleomargarine, and at great expense had fitted themselves for the same; that up to and including May 21st, 1885, they had followed this occupation, and n so doing derived great gains and profits, and it was in the pursuit of such calling they had manufactured and sold the oleomargarine butter for which they were indicted in this case. (Pages 10 and 11.)

Their liberty was the choice of a vocation in life, and amongst others they choose to manufacture and sell oleomargarine butter. It was, and is, as we have seen, an article of food. It is wholesome and nutritious. The dealing in it injured neither the public morals nor the public safety, nor the public health.

It was a source of profit to them and was a means of livelihood.

Yet this avocation of theirs is absolutely prohibited by the quoted Act. It says that no person shall either manufacture or sell or have in his or her or their possession with intent to sell the same (oleomargarine), if such manufactured product is intended as a substitute for dairy butter. There is no provision in any shape or form in the Act by which the question of the healthfulness and wholesomeness of the product and the harmless nature of the avocation can be tested. *Without any such examination or investigation the whole trade is stricken down.*

The offer of proof which the Court below said was irrelevant and immaterial was to show that the trade was wholesome and that oleomargarine was as healthful as dairy butter. It is obvious that if this legislation is sustained Pennsylvania is permitted to say that persons engaged in the manufacture and sale of oleomargarine butter shall no longer continue therein, and this notwithstanding the fact that the manufacture and sale of it is a peaceful and harmless avocation which the Plaintiffs in error, and others were pursuing as a means of obtaining a livelihood.

Without any evidence that the avocation was unhealthful or unwholesome, or tended in any way to debauch the public morals or endanger the public health or safety, the purchase or sale of oleomargarine is absolutely prohibited when it comes in conflict with the sale of dairy butter. Of course this means a total prohibition because it is an oily substance used as a substitute for butter.

This Act deprives the Plaintiffs in error of their avocation or calling in life.

Is the manner of this deprivation "due process of law?"

It would be useless to review all the cases in this Court and elsewhere defining what is due process of law, but we follow the intimation of this Court to deal with each particular case as it arises, and without attempting a general definition, we state with

confidence, under the rulings of this Court, the proposition that a mere legislative rescript such as this, is not due process of law. Without providing for any *real* judicial trial it makes the Courts the mere instrument of the legislature by which to inflict penalties and punishments, because, and only *because*, the legislature has said so. No place is left for judicial discretion; no opportunity is given the accused to show that his liberty and property is causelessly taken from him. There is not any provision for the observance of the general rules which Courts have established for the protection of personal liberty and private property.

In *Murray's Lessee vs. Hoboken Land Company*, 18 *Howard*, 276, Mr. Justice Curtis, in considering the meaning of these words, said:

> "The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judical powers of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law' by its mere will."

In *Davidson vs. New Orleans*, 96 *U. S., page* 102, Mr. Justice Miller said:

> "It is easy to see that when the great Barons of England wrung from King John at the point of the sword the concession that neither their lives nor their property should be disposed of by the crown except as provided by the law of the land they meant, by the law of the land, the ancient customery laws of the English people, or laws enacted by parliament of which these Barons were a controlling element. It was not in their minds therefore to protect themselves against the enactment of laws by the parliament of England. But when in the year of grace 1866, there is placed in the Constitution of the United States, a declaration that 'no State shall deprive

any person of life, liberty or property without due process of law, *can a State make anything due process of law which by its own legislation it chooses to declare such?* To affirm this is to hold that the prohibition of the States is of no avail, or has no application where the invasion of private rights is affected under the forms of State legislation. * * * But apart from the imminent risk of a failure to give any definition which would be at once perspicuous, comprehensive and satisfactory, there is wisdom, we think, in the ascertaining of the intent of the application of such an important phrase in the Federal Constitution by the gradual process of judicial inclusion and exclusion as the case presented for decisions shall require with the reasoning on which such decisions may be founded." * * *

In the same case, page 107, Mr. Justice Bradley said:

"I think therefore we are entitled under the Fourteenth Amendment, not only to see that there is some process of law, but 'due process of law' provided by the State law, when a citizen is deprived of his property; and that in judging what is due process of law, respect must be had to the cause and object of the taking whether under the taxing power, the power of eminent domain or the power of assessment for local improvements or none of these; and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law.'"

In *Hagar vs. The Reclamation District* 111, *U. S.* 707, Mr. Justice Field said:

"It is no doubt wiser, as stated by Mr. Justice Miller in *Davidson vs. New Orleans* to arrive at its meaning by the gradual process of judicial inclusion and exclusion as the cases presented for decision shall require, with the reasoning on which such decisions may be founded.

"It is sufficient to observe here, that by "due process" is meant one which following the forms of law, is appropriate to the case

and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; *and whenever it is necessary for the protection of the parties it must give them an opportunity to be heard respecting the justice of the judgment sought.* The clause in question means therefore that their can be no proceeding against life, liberty, or property which may result in the deprivation of either without the observance of those general rules established in our system of jurisprudence for the security of private rights."

In *Dartmouth College case, 4th Whea'*, 510, Mr. Webster's celebrated definition was:

> "By the law of the land is more clearly identified the "general law, a law which hears before it condemns, which "proceeds upon inquiry and renders judgment only after "trial. The meaning is that every citizen shall hold his "life, liberty or property or immunities under the protection "of the general rule which governs society. Everything "which may pass under the form of an enactment is not "therefore to be construed the law of the land."

A legislative enactment, therefore, is not in all cases due process of law.

Admitting the enactment to be under the guise of the police power of the State it is not necessarily a police law merely because the legislature have said so. If it is not a police law, properly speaking; if it does not in fact legislate in reference to the public health, peace, good order or comfort, or safety, but is an insidious attack under the guise of such legislation upon the rights of a citizen, it cannot be due process of law. If it has no real and substantial relation to the public health, but strikes down the harmless avocation of one citizen because it comes in competition and conflict with that of another, it is a legislative rescript.

This Act leaves nothing for judicial discretion or investigation. The Court is powerless and can only register the legislative decree.

This Court in the Kansas Prohibition cases said:

> "It is said that by the 13th section of the Act of 1885, the Legislature, finding a brewery within the State in actual operation, without notice, trial or hearing, by the mere exercise of its arbitrary caprice, declares it to be a common nuisance, and there prescribes the consequences which are to follow inevitably by judicial mandate required by the statute, and involving and permitting the exercise of no judicial discretion or judgment; that the brewery being found in operation the Court is not to *determine* whether it is a common nuisance, but under the command of the statute is to *find it* to be one; that it is not the liquor made, or the making of it, which is thus enacted to be a common nuisance, but the place itself, including all the property used in keeping and maintaining the common nuisance; that the judge having thus signed without inquiry—and it may be contrary to the fact and against his own judgment—the edict of the legislature, the Court is commanded to take possession by its officers of the place and shut it up; nor is all this destruction of property, by legislative edict, to be made as a forfeiture consequent upon conviction of any offense, but merely because the legislature so commands; and it is done by a *Court of equity* without any previous conviction first had, or any trial known to the law.
>
> "This, certainly, is a formidable arraignment of the legislation of Kansas, and if it were founded upon a just interpretation of her statutes, *the Court would have no difficulty in declaring that they could not be enforced without infringing the constitutional rights of the citizen.*"

So under the oleomargarine butter statute the Court which tries the cause does nothing except one thing—find out if the accused made or sold, or had for sale the oleaginous compound as a substitute for butter. If that is found the penalty follows, even though the Court should be fully satisfied that instead of being in the least injurious to the public it was highly beneficial.

Is this due process of law? A law which hears and passes before it decides? Are these the general principles of law, a due regard for which must be shown when a citizen's liberty is invaded?

If so, what occupation may not be prohibited?

The farmer who tills the soil; the mechanic who works at the anvil, or in any of the multiplied forms of industrial enterprise; the merchant who engages in trade; the doctor who heals the sick. Indeed, every branch of industry, one after the other or all together may be stopped.

This Act affords no opportunity for the citizen to show how useful and harmless his avocation is. Without a trial, or any investigation, which goes to the real merits of the question, he is found guilty and punished, and the courts of his State, in answer to his demand for his constitutional rights, reply, we are powerless to review this Act of the legislature.

Without going into details, we repeat that the manufacture and sale of oleomargarine was a peaceful occupation, harmless to none.

Prior to the Act of May 21st, 1885, the Plaintiffs in error were in the pursuit of their calling and occupation. They had fitted themselves, therefore, at great expense. It was their liberty so to do.

The Act May 21st, 1885, prohibited them from further continuing it.

For no reason except a rival's advancement, it took from them their liberty, and deprived them of the means of livelihood.

This *must be* a deprivation of liberty without due process of law, and is therefore unconstitutional.

VI. The Act of May 21, 1885, is in conflict with the fourteenth amendment, because it deprives the Plaintiffs in error of their property without due process of law.

It does this in several ways.

(1.) The Defendants offered to prove that in the years 1881, 1882 and 1883, they purchased a large quantity of machinery especially made for and adapted to the manufacture of oleomargarine butter and erected the same in a building for that purpose prior to the first day of January, 1885, and that they invested in said machinery the sum of twenty-five thousand ($25,000) dollars.

That the Act of May 21st, 1885, deprives them of the use of the machinery for the purpose for which it was made, and renders it less valuable to the amount of twenty thousand ($20,000) dollars. That the said machinery was bought and erected in the County of Allegheny, in the State of Pennsylvania, at a time when it was lawful under the laws of the State so to do.

(2.) By the use of this machinery and not otherwise, the Plaintiffs in error had manufactured the oleomargarine sold to the prosecuting witness.

(3.) That the Plaintiffs in error had built up a large and valuable trade in the manufacture and sale of oleomargarine, and were in receipt of large gains and profits therefrom, and that the Act of May 21st, 1885, deprived them of the said gains and profits and occupation in life.

(4.) The State in the administration of the Act of May 21st, 1885, extracted from the Plaintiffs in error in the shape of a penalty, the sum of one hundred ($100) dollars. As this was for the following of a harmless and lawful occupation in life, it was depriving them of their property without due process of law.

In *Bartmeyer vs. Iowa*, 18 *Wallace* 133, when the prohibition law of Iowa was considered, this Court said:

"But if it were true, and it was fairly presented to us, that the Defendant was the owner of the glass of intoxicating liquor which he sold to Hickey at the time that the State of Iowa first imposed an absolute prohibition on the sale of such liquors, then we concede that two very grave questions would arise, namely: 1. Whether this would be a State law depriving him of his property without due process of law; and secondly, whether if it were so, it would be so far a violation of the Fourteenth Amendment in that regard as would call for Judicial action by this Court."

In the *Beer Co. vs. Massachusetts*, 97 *U. S.* 25, it was again said:

"We do not mean to say that property actually in existence and in which the right of the owner has become vested may be taken for the public good without discompensation."

"The right to manufacture includes the incidental right to "dispose of the liquors manufactured."

Beer Co. vs. Massachusetts, 97 *U. S.* 32.

"The right of property includes the right to sell."

Thurman vs. Elder, 24 *New York*, 384, 385.

"The exclusive right of using and transferring property "follows as a natural consequence from the perception and "admission of the right itself."

2 *Kent's Com.* * *page* 320—(13*th Ed.*)

"The power of alienation of property is a *necessary inci-* "*dent* to the right of p operty."

2 *Kent's Com.* * *page* 327—(13*th Ed.*)

The Plaintiffs in error had invested their money in machinery and property to carry on a harmless profitable business. Their right to do so at that time was unquestioned. Without in any way

showing that this business had become dangerous to the public health or morals or peace or good order, the State of Pennsylvania deprives them of the use of it. It also deprives them of the right to sell a harmless product made by this machinery.

> The right to sell and the right to use are two essential elements of property.

Winehamer vs. The People, 13 *N. Y.*, 378, 433.
Storman vs. Elder, 24 *N. Y.*, 384, 385.
Eaton vs. The B. C. & M. R. R., 51 *New Hampshire*, 511.
1*st Blackstone's Commentaries*, * *page* 8.

We admit that the Kansas Prohibition cases substantially rule that such a use and sale may be prohibited if its consequencee injuriously affect the public health, peace or morals. But if its consequences do not in any way injuriously affect the public peace, health or morals, buton the contrary are beneficial, then we submit that the legislature cannot deprive the citizen of his property, thus acquired, and of the essential elements of the right of property, and that to do so is to deprive him of his property without due process of law.

Certainly the use and sale of the thing are two of the most essential elements of property.

If the oleomargarine butter was wholesome, harmless and in no way injured the public, or the neighbors of the Plaintiffs in error, why should they be deprived of their right to the use and enjoyment and disposal of it?

In *Blackstone's Commentaries, Vol.* 1*st, page* 138, he says:

> "The third absolute right inherent in every Englishman
> "is that of property, which consists in the free use, enjoy-
> "ment and disposal of all his acquisitions without any con-
> "trol or diminution save only by the law of the land."

In *Pumpelly vs. Green Bay Company*, 13 *Wall.* 166, 167, Mr. Justice Miller said:

"There may be such serious interruptions to the common and necessary use of property as will be equivalent to a taking within the meaning of the constitution."

In *The People vs. Otis*, 98 *N. Y.* 48, the Court said:

"Depriving an owner of property, of one of its attributes is depriving him of his property within the constitutional provision."

In *Wynehamer vs. The People*, 13 *N. Y.*, 378, 398, the Court of Appeals said:

"When a law annihilates the value of property and strips it of its attributes by which alone it is distinguished as property, the owner is deprived of it according to the plainest interpretation and certainly within the constitutional provision intended expressly to shield personal rights from the exercise of arbitrary powers."

In the matter of the application of *Jacobs*, 98 *N. Y.* 105, that Court again said, where a law had prohibited the making of cigars in tenement houses:

"It is therefore plain that this law interferes with the profitable use of his property by the owner or lessee of a tenement house who is a cigar maker and trammels him in the application of his industry and the disposal of his liberty and thus in a strict legitimate sense it arbitrarily deprives him of his property and of some portion of his personal liberty. The constitutional guarantee that no person shall be deprived of his property without due process of law may be violated without the physical taking of the property for public or private use."

In *Eaton vs. B. C. & M. R. R.*, 51 *New Hampshire*, 511, the Supreme Court of that State, said:

"The term 'property,' although in common parlance frequently applied to a tract of land or a chattel in its legal

"signification 'means only the rights of the owner in relation "to it. 'It denotes a right * * * over a determinate "thing. Property is the right of any person to possess, use, "enjoy and dispose of a thing.' * * * The right of in- "definite user (or of using indefinitely) is an es-ential qual- "ity or attribute of absolute property without which abso- "lute property can have no legal existence. Use is the real "side of property * * * From the very nature of these "rights of user. * * * It is evident that that cannot be "materially abridged without *ipso facto* taking the owner's "property."

Wood's Railway Law, Section 253.

In another way Plaintiffs in Error will be deprived of their property if the judgment of the Court below is affirmed. The State of Pennsylvania takes from them one hundred dollars of their money because they sold oleomargarine butter as a substitute for dairy butter. It is taken from them as a penalty for exercising their constitutional right of liberty. Without repeating the argument heretofore made, it did this, *not* by due process of law, but by legislative rescript, and therefore the Act so administered has deprived them of their property without due process of law.

(VII.) *An examination of the cases and authorities bearing on the oleomargarine legislation:*

The Supreme Courts of Missouri and of Pennsylvania have sustained such legislation as constitutional.

State vs. Addington, 77 Missouri, 110.

The Pennsylvania decision follows that of Missouri in leaving the whole matter to the legislature.

The Missouri Court said, page 117:

"The position of the Defendant in substance is, that if the wholesomeness of the article as one of food, could be estab-

lished, that thereby the constitutionality of the Act which forbids its sale would be overthrown. This is clearly a *non sequitur*. Such a position, if pushed to its logical conclusion, would utterly overthrow the exercise of the police power by the State; overthrow every law, the wisdom of which would not bear the test of scrutiny. Proceeding on such a theory, a man arrested for killing game at an unlawful season, might appropriately offer to prove that the birds killed were injurious to the public or were destructive to crops."

Exactly how the police power would be overthrown by the judicial department of the government seeing to it that a law called a police law is such *in fact* and does *as a fact* have relation to the public health, morals or peace, and does not, under the guise of the police power, attack and defeat the private rights of personal liberty and property, is not quite plain. Just such supervision this Court since its foundation has exercised over cases arising within its jurisdiction, and it is certainly a new doctrine of these latter days that a legislature is the final judge of questions of fact and of its own powers.

It is also a new doctrine that a man has *property* in the shooting of birds, and to decide a case involving constitutional liberty and the protected right of private property by a faulty and pernicious analogy which the Court draws, surely does not lend weight to the case as an authority.

The decision of the Supreme Court of Pennsylvania and Missouri were not unanimous.

In the Missouri case the Chief Justice dissented, and in the Pennsylvania case Mr. Justice Gordon filed a dissent printed in the record, pages 32, 33, 34.

A unanimous decision of the Court of Appeals of the State of New York held that a statute identical with the Pennsylvania Act was unconstitutional.

People vs. Marx, 99 *New York*, 377. We quote from it as follows:

"It appears to us quite clear that the object and effect of the enactment under consideration were not to supplement the existing provisions against fraud and deception by means of imitations of dairy butter, but to take a further and bolder step, and by absolutely prohibiting the manufacture or sale of any article which could be used as a substitute for it, however openly and fairly the character of the substitute might be avowed and published, to drive the substituted article from the market, and protect those engaged in the manufacture of dairy products against the competition of cheaper substances capable of being applied to the same uses, as articles of food

"The learned counsel for the respondent frankly meets this view, and claims in his points, as he did orally upon the argument, that even if it were certain that the sole object of the enactment was to protect the dairy industry in this State against the substitution of a cheaper article made from cheaper materials, this would not be beyond the power of the Legislature. This, we think, is the real question presented in the case. Conceding that the only limits upon the legislative power of the State are those imposed by the State Constitution and that of the United States, we are called upon to determine whether, or not, those limits are transgressed by an enactment of this description. These limitations upon legislative power are necessarily very general in their terms, but are at the same time very comprehensive. The Constitution of the State provides (Art. 1, §1) that no member of this State shall be disfranchised, or deprived of any of the rights and privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers. Section 6, of article 1, provides that no person shall be deprived of life, liberty or property, without due process of law, and the Fourteenth Amendment to the Constitution of the United States provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

These constitutional safeguards have been so thoroughly discussed in recent cases that it would be superfluous to do more than to refer to the conclusions which have been reached bearing upon the question now under consideration. Among these no proposition is now more firmly settled than that it is one of the fundamental rights and privileges of every American citizen to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit. (*Live Stock Association vs. The Crescent City, etc.*, 1 *Abb.* (*U. S.*) 398; *Slaughter House Cases*, 16 *Wall*, 106; *Corfield vs. Coryell*, 4 *Washington, D. C.* 380; *Matter of Jacobs*, 98, *N. Y.* 98.)

"The term 'liberty,' as protected by the constitution, is not cramped into a mere freedom from physical restraint of the person of the citizen, as by incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. In the language of Andrews, J., in *Bertholf vs. O'Reilly* (74 *N. Y.* 515), "the right to liberty embraces the right of man 'to exercise his faculties and to follow a lawful avocation for the support of life," and as expressed by Earl, J., in *In re Jacobs*, "one may be deprived of his liberty, and his constitutional right thereto violated, without the actual restraint of his person. Liberty in its broad sense, as understood in this country, means the right not only of freedom from servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation."

"Who will have the temerity to say that these constitutional principles are not violated by an enactment which absolutely prohibits an important branch of industry for the sole reason that it competes with another, and may reduce the price of an article of food for the human race.

"Measures of this kind are dangerous even to their promoters. If the argument of the respondent in support of the absolute power of the legislature to prohibit one branch of industry for the purpose of protecting another with which it competes can be sustained, why could not the oleomargarine manufacturers, should they obtain sufficient power to influence or control the legislative councils, prohibit the manufacture or sale of dairy products? Would arguments then be found wanting to demonstrate the invalidity under the Constitution of such an act? The principle is the same in both cases. The numbers engaged upon each side of the controversy cannot influence the question here. Equal rights to all are what are intended to be secured by the establishment of constitutional limits to legislative power, and impartial tribunals to enforce them."

The only other case upon the subject is that of *In Re Brosnahan*, 18 *Federal Reporter*, 62.

This was a proceeding by a writ of *habeas corpus* before Justices Miller and McCrary sitting at circuit.

So far as the opinion shows the Court did not pass upon two questions now urged before this Court. They are, (1) That the Pennsylvania Act denies to the Plaintiffs in Error the equal protection of the laws, and (2) deprives them of their liberty.

The opinion does say that in that case the prisoners were not deprived of their property without due process of law and remanded them to the State Court.

The oleomargarine legislation has caused considerable discussion lately as to its constitutionality and as to the limits of the police power.

Tiedeman, on the Limitations of the Police Power, treats at length of this legislation and holds it unconstitutional. See also an article in the *Political Science Quarterly*, for December, 1887.

D. T. WATSON,
Attorney for Plaintiffs in Error.

APPENDIX.

AN ACT

For the protection of the public health, and to prevent adulteration of dairy products and fraud in the sale thereof.

SECTION 1. *Be it enacted, &c.*, That no person, firm or corporate body shall manufacture out of any oleaginous substance or any compound of the same, other than that produced from unadulterated milk or of cream from the same, any article designed to take the place of butter or cheese produced from pure unadulterated milk, or cream from the same, or of any imitation or adulterated butter or cheese, nor shall sell or offer for sale, or have in his, her, or their possession with intent to sell the same as an article of food.

SEC. 2. Every sale of such article or substance, which is prohibited by the first section of this Act made after this Act shall take effect, is hereby declared to be unlawful and void, and no action shall be maintained in any of the Courts in this State to recover upon any contract for the sale of any such article or substance.

SEC. 3. Every person, company, firm or corporate body who shall manufacture, sell or offer or expose for sale or have in his, her or their possession with intent to sell, any substance, the manufacture and sale of which is prohibited by the first section of this Act, shall, for every such offense, forfeit and pay the sum of one hundred dollars, which shall be recoverable with costs by any person suing in the name of the Commonwealth as debts of like amounts are by law recoverable; one-half of which sum, when so recovered shall be paid to the proper county treasurer for the use

of the county in which suit is brought and the other half to the person or persons at whose instance such a suit shall or may be commenced and prosecuted to recovery.

SEC. 4. Every person who violates the provisions of the first section of this Act, shall be deemed guilty of a misdemeanor, and upon conviction, shall be punished by a fine of not less than one hundred dollars, nor more than three hundred, or by imprisonment in the county jail for not less than ten nor more than thirty days, or both, such fine and imprisonment for the first offense, and imprisonment for one year for every subsequent offense.

SEC. 5. It shall be the duty of constables of the several cities, boroughs, wards and townships of this Commonwealth, to make quarterly reports under oath to the Courts of Quarter Sessions of all violations of any of the provisions of this Act which may come or be brought to their notice, and it shall be the duty of the judges of said Courts to see that said returns are made regularly and faithfully.

SEC. 6. This Act shall take effect on the first day of July, one thousand eight hundred and eighty-five.

SEC. 7. All Acts or parts of Acts inconsistent with the provisions of this Act are hereby repealed.

Approved, the 21st day of May, A. D. 1885.

ROB'T E. PATTISON.

AN ACT

For the protection of dairymen and to prevent deception in sales of butter and cheese.

SECTION 1. *Be it enacted, &c.,* That every person who shall manufacture for sale, or who shall offer or expose for sale, or who shall export to a foreign country, by the tub, firkin, box or package, or any greater quantity, any article or substance in semblance

of butter or cheese, not the legitimate product of the dairy, and not made exclusively of milk or cream, but into which any oil, lard or fat, not produced from milk or cream, enters as a component part, or into which melted butter or any oil thereof has been introduced to take the place of cream, shall distinctly and durably stamp, brand or mark upon the side of every cheese, and also upon the top and side of every such tub, firkin, box or package of such article or substance, the words "oleomargarine butter," or if containing cheese, the words "imitation cheese" only, where it can be plainly seen in Roman letters, which shall be burned in or painted thereon with permanent black paint in a straight line, and shall not be less than one-half inch in length, and if for export shall also invoice the same and clear the same through the custom house as "oleomargarine butter," or if cheese, as "imitation cheese," and in case of retail sales of such articles or substances in parcels, the seller shall, in all cases, sell or offer or expose the same for sale from a tub, firkin, box or package stamped, branded or marked, as herein stated, and shall also deliver therewith to the purchaser, printed label bearing plainly printed words "oleomargarine butter," or if cheese the words "imitation cheese" only, in Roman letters, not less than one-half inch in length, which shall be printed in a straight line, and every sale of such article or substance, or export of the same, by the tub, firkin, box or package, or in any greater quantity; not so stamped, branded or marked, and, if exported, not invoiced and cleared through the custom house as "oleomargarine butter," or if cheese as "imitation cheese," and every sale of such article or substance at retail in parcels that shall not be sold from a tub, firkin, box or package so stamped, branded or marked, or without delivery of a label therewith as above stated, is declared to be unlawful and void and no action upon any contract shall be maintained in any of the Courts of this State to recover upon any contract for the sale of any such article or semblance not so stamped, branded, marked, labeled or sold.

SEC. 2. Every person who shall sell, or offer or expose for sale, or export to a foreign country, or have in his or her possession with intent to sell, by the tub, firkin, box or package,

or in any greater quantity, any of the said article or substance, required by the first section of this Act to be stamped, branded, marked, and if exported, invoiced and cleared through the custom house as "oleomargarine butter" or "imitation cheese" as therein stated, that shall not be so stamped, branded, marked, and if exported, invoiced according to the provisions of this Act, or in case of retail sales in parcels, every person who shall sell, or offer or expose for sale any of said article or substance without selling, offering or exposing for sale the same from a tub, firkin, box or package, stamped, branded or marked as in said first section stated, or without delivery of a label as required by section one of this Act, shall for every such offense, forfeit and pay a fine of one hundred dollars, to be recovered, with costs, in any of the Courts of this State having cognizance thereof in an action to be prosecuted by any district attorney in the name of the Commonwealth, and shall be paid into the county treasury.

SEC. 3. Every person who shall sell or offer or expose for sale or export to a foreign country, or who shall cause or procure to be sold, offered or exposed for sale, by the tub, firkin, box or package, or in any greater quantity, any article or substance required by the first section of this Act to be stamped, branded, marked, and if exported, invoiced and cleared as therein stated, not so stamped, branded, marked, and if exported, invoiced and cleared, or in case of retail sales in parcels, every person who shall sell, or offer or expose for sale, or who shall cause or procure to be sold, offered or exposed for sale, any article or substance required by the first section of this Act to be sold, offered or exposed for such sale from a tub, firkin, box or package stamped, branded or marked, and labeled as therein stated contrary to the provisions of said section, shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than fifty dollars nor more than two hundred dollars, or by imprisonment in the county jail for not less than ten nor more than thirty days, or by both such fine and imprisonment for each and every offense.

SEC. 4. All Acts or parts of Acts inconsistent with the provisions of this Act, are hereby repealed.

Approved, the 24th day of May, A. D. 1883.

ROBERT E. PATTISON.

AN ACT

To prevent deception in the sale of butter and cheese.

SECTION 1. *Be it enacted*, &c., That every person who shall manufacture for sale or who shall offer or expose for sale, any article or substance in semblance of butter or cheese, not the legitimate product of the dairy, and not made exclusively of milk or cream, but into which the oil or fat of animals not produced from milk enters as a component part, or into which melted butter or any oil thereof has been introduced to take the place of cream, shall conspicuously and durably stamp, brand or mark upon every tub, firkin, box or package of such article or substance, the word "oleo-margarin," in type or letters not less than one-half inch; and in case of retail trade of such article or substance in parcels, the seller shall in all cases deliver therewith to the purchaser a written or printed label, bearing the plainly written or printed word "oleo-margarin," in type or letters as aforesaid; and every sale of such article or substance not so stamped, branded, marked or labeled, is declared to be unlawful, and no action shall be maintained in any of the Courts of this State to recover upon any contract for the sale of any such article or substance not so stamped, branded, marked or labeled.

SEC. 2. Every person who shall knowingly sell, or offer to sell, or have in his or her possession, with intent to sell, contrary to the provisions of this Act, any of the said articles or substance required by the first section of this Act, to be stamped, marked or labeled, as therein stated, not so stamped, marked, or labeled, or in case of retail sale, without delivery of a label required by section one of this Act, shall for each such offense,

forfeit and pay a fine of one hundred dollars, to be recovered with costs in any of the Courts of this State, having cognizance thereof, in an action to be prosecuted by the district attorney in the name of the people, and the one-half of such recovery shall be paid to the informer and the residue shall be applied to the support of the poor in the county where such recovery is had.

SEC. 3. Every person who shall knowingly sell, or offer, or expose for sale, or who shall cause or procure to be sold, or offered, or exposed for sale, any article or substance required by the first section of this Act to be conspicuously and durably marked, branded, stamped or labeled, not so marked, branded, stamped or labeled, shall be guilty of a misdemeanor, and on trial for such misdemeanor, proof of the sale, or offer, or exposure alleged, shall be presumptive evidence of knowledge of the character of the article so sold or offered, and that the same was not marked, branded, stamped or labeled as required by this Act.

Approved, the 22d day of May, A. D., 1878.

J. F. HARTRANFT.

forfeit and pay a fine of one hundred dollars, to be recovered with costs in any of the Courts of this State, having cognizance thereof, in an action to be prosecuted by the district attorney in the name of the people, and the one-half of such recovery shall be paid to the informer and the residue shall be applied to the support of the poor in the county where such recovery is had.

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Approved, the 22d day of May, A. D., 1878.

J. F. HARTRANFT.

127-699

No. 1303. October Term, 1887.

IN THE

Supreme Court of the United States.

Hay Walker, Jr., John H. Wilson, George Hasly, Emil Winter and Harvey Wilson,

Plaintiffs in Error,

vs.

Commonwealth of Pennsylvania.

Error to Supreme Court of Pennsylvania.

Brief of Defendant in Error.

A. H. WINTERSTEEN,
WAYNE MacVEAGH,
For Defendant in Error.

ALLEN, LANE & SCOTT, PRINTERS, PHILADELPHIA.

Supreme Court of the United States.

Hay Walker, Jr., et al.

vs.

Commonwealth of Pennsylvania.

October Term, 1887.

No. 1303.

BRIEF OF DEFENDANT IN ERROR.

At the request of the District Attorney of Allegheny county, where this case was tried, the following brief is submitted for the defendant in error :—

The only respect in which this case differs from the case of W. L. Powell *vs.* Commonwealth of Pennsylvania, No. 914, is that the prosecution was against certain *manufacturers* of oleomargarine, who set up the defense that by virtue of the operation of the act of 1885, their machinery specially adapted for the manufacture of the prohibited article was made less valuable, whereby they were deprived of their property without due process of law.

The Powell case was a prosecution against a *seller* and not a manufacturer of the prohibited article. All the other questions raised in this case are the same as those raised in the Powell case. The brief of the defendant in error in the case of Powell *vs.* Commonwealth is therefore adopted by the defendant in error in this case. The specific point raised in this case has been directly ruled by this court against the contention of the plaintiff in error in the recent decision of Mugler

vs. Kansas, and State *vs.* Ziebold, 123 U. S., decided December 5th last. It was there flatly ruled that the incidental reduction in the value of machinery and buildings adapted for the manufacture of a prohibited article is not a taking of property without due process of law in the sense in which that phrase is used in the Fourteenth Amendment to the Federal Constitution.

The judgment, therefore, of the Supreme Court of Pennsylvania should be affirmed.

A. H. WINTERSTEEN,
WAYNE MACVEAGH,
For Defendant in Error.

127-699
DEC 3 1887

No. *October Term, 1887.*

IN THE

Supreme Court of the United States.

Hay Walker, Jr., John H. Wilson, George Hasly, Emil Winter and Harvey Wilson,
Plaintiffs in Error,

vs.

Commonwealth of Pennsylvania.

ERROR TO SUPREME COURT OF PENNSYLVANIA.

Brief for the Commonwealth of Pennsylvania in opposition to the motion to argue this case with case of Powell *vs.* Commonwealth of Pennsylvania, No. 914, October Term, 1887.

WAYNE MacVEAGH,
For Defendant in Error in
Powell vs. *Commonwealth No. 914, October Term, 1887.*

Allen, Lane & Scott, Printers, Nos. 229, 231, and 233 South Fifth Street, Philadelphia.

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The judgment, therefore, of the Supreme Court of Pennsylvania should be affirmed.

A. H. WINTERSTEEN,
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For Defendant in Error.

127-699

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Supreme Court of United States.

Hay Walker, Jr., et al.		October Term, 1887.
vs.		No.
Commonwealth of Pennsylvania.		

The motion of the plaintiff in error is made under rule 26, section 8, which provides as follows:—

Two or more cases, involving the same question, may by the leave of the court be heard together; but they must be argued as one case.

The case of Powell *vs.* Commonwealth, No. 914, October Term, 1887, is a case in error to the Supreme Court of Pennsylvania, which was advanced by this court and placed for argument early after the coming Christmas recess. It arose out of a prosecution in the Court of Quarter Sessions of Dauphin county, Pennsylvania, against W. L. Powell for unlawfully selling oleomargarine or imitation butter contrary to the provisions of the act of the Legislature of Pennsylvania, approved May 21st, 1885. The decision of the Supreme Court of Pennsylvania, declaring the constitutionality of the act, and affirming the conviction of Powell in the trial court, was rendered June 3d, 1886.

Promptly upon the rendering of the decision, and the taking of the writ of error from this court, the Commonwealth of Pennsylvania, the defendant in error, had the record transcripted and moved to dismiss or affirm. Failing to secure a dismissal or affirmance on motion, a motion to advance was then made, resulting in the setting down of the case for argument on its merits early in January next.

The case of Commonwealth *vs.* Hay Walker, Jr., *et al.*, was a prosecution in the Court of Quarter Sessions of Allegheny county, Pennsylvania, which was begun in the spring

of 1887, after the Supreme Court of Pennsylvania had decided the Powell case, and after that case had been docketed in this court by the Commonwealth of Pennsylvania. The offence for which the prosecution was begun was not committed until February 2d, 1887, which was after the former case had been docketed. The time of the commission of the offence and of the prosecution thereupon, taken in connection with the fact that the Powell case was then in this court with the Commonwealth urging its early consideration, warrants the very strong presumption that the case was especially made for a purpose; and certainly to argue it with the Powell case would have the effect of confusing its facts with those of the Powell case, and by the introduction of other questions, complicating the simple question of law raised by that case.

The Federal question raised, and the only Federal question raised by the Powell case, as the transcript of record will show (Powell Record, page 18, folio 27), is this: was the defendant's *sale* of a specific portion of oleomargarine, after the Pennsylvania prohibitory law of 1885 went into effect (the article not having been manufactured by the defendant and not having been owned by him before the law went into effect), protected by the Constitution of the United States, which forbids the taking of liberty or property without due process of law, and guarantees to all the equal protection of the laws. Both the Court of Quarter Sessions of Dauphin county, Pennsylvania, and the Supreme Court of Pennsylvania, decided that such a sale of an inhibited article was not within the protection of the Federal Constitution. The Commonwealth of Pennsylvania, it is respectfully submitted, is entitled to have the decision of this Court upon this particular question, unconfused with that of any other constitutional question growing out of the Pennsylvania oleomargarine law of 1885.

The case of Commonwealth of Pennsylvania *vs.* Hay Walker, Jr., *et al.*, now here in error, under the title Hay Walker, Jr., *et al. vs.* Commonwealth of Pennsylvania, was a prosecution against certain *manufacturers* of oleomargarine, who set up

the defence that by virtue of the operation of the act of 1885, their machinery specially adapted to the manufacture of the prohibited article was made less valuable, whereby they were deprived of their property without due process of law. The question raised by this case, it will be observed, is therefore entirely different from that raised by the Powell case. It superadds to the simple question of the mere alleged right of sale of a prohibited article *bought after* the inhibition went into effect, the additional question of the alleged right of a manufacturer to compensation for loss of value of machinery *bought before* the inhibition went into effect.

That the latter is an important new question not before the court in the Powell case, and raised for the first time in the Walker case, can be seen by comparing the Powell Record, page 18, folio 27, with the offer of proof made in the trial court in the Walker case, which for convenience is printed as an appendix hereto.

It is obvious that it is a very different claim of right—that of compensation for machinery which has been reduced in value by a prohibitory law—from that of sale of a prohibited article bought after the prohibition was promulgated. In so far as a prohibitory law may affect investments made before its passage, it might be declared inoperative without affecting its constitutionality as to investments and transactions after it went into effect.

The proposition the counsel for Walker now make is that these two questions, raised by the two different cases, should be confused by the hearing of the cases together as one. The object is, doubtless, to secure a determination by this court of the general question of the constitutionality of the Pennsylvania oleomargarine act of 1885, upon the special facts that appear by the offers of proof in the Walker case. This proposition is not only unfair to the Commonwealth of Pennsylvania, but is not sanctioned by the rule of court.

Investments in machinery for the manufacture of oleomargarine in Pennsylvania have never been very considerable. The sale of the manufactured article has, however, been common. The Commonwealth of Pennsylvania, it is sub-

mitted, is entitled to have its right to prohibit the sale of the article determined independently of the question of the obligation to compensate such persons, if any, as have made prior investments for the purpose of making the article.

And the rule of court supports this right. It permits the hearing of two cases together *only when they involve the same question.*

But the questions raised in the Powell and Walker cases are entirely different. They grew out of two wholly different transactions, and do not depend at all upon the same facts. It is quite possible to decide one without disposing of the other. The only thing in common between them is that they are prosecutions under the same law.

It is said that the single question in each case is the constitutionality of the Pennsylvania oleomargarine act of 1885. The questions in the cases are rather whether the defendants were lawfully convicted under the act, and the determination of the constitutionality of the act is to be considered only as the provisions of the act are applied to the facts of the particular case.

Of course counsel cannot make the questions involved the same merely by invoking for the protection of their clients the same sections of the Federal Constitution.

But the rule of court further provides that if two or more cases are to be heard together *they must be argued as one case.* This cannot be consented to by the Commonwealth, and to require it would be a great hardship. The Powell case was begun and prosecuted in Dauphin county, Pennsylvania, by the district attorney, assisted by the counsel whose name is signed to this brief. It was carried through its successive stages by the district attorney of that county, assisted by the same counsel. The Walker case, which it is now proposed to have heard at the same time, and as one case with the Powell case, was begun and prosecuted in a distant county by wholly different counsel, and without the knowledge or acquiescence of counsel for the Commonwealth in the Powell case. The latter do not even

know the names of the counsel who represented the prosecution in Walker's case. They not only had nothing to do with making the record in it, but have never seen the record, or any portion of it, excepting those portions contained in the brief now sent by counsel for the plaintiff in error. Further, they have no authority to represent the Commonwealth in Walker's case.

Without any familiarity with or knowledge of the case which it is now proposed to have made one with the Powell case, it would be grossly unjust to the counsel representing the defendant in error in No. 914, and to defendant in error itself, to grant the present motion. The motion is wholly outside of the letter or the spirit of the rule. It is apparently without any sound reason, and it is believed to be without precedent.

WAYNE MacVEAGH,
For Defendant in Error in W. L. Powell vs. *Commonwealth of Pennsylvania, October Term, 1887, No. 914.*

APPENDIX.

Defendants' Offer of Proof in Walker Case.

The defendants now offer to prove that prior to the twenty-first day of May, A. D. 1885, and on the tenth day of May, 1881, they were and they ever since have been and still are citizens of the State of Pennsylvania, residing within the county of Allegheny, in said State, and that on May 10th, 1881, they associated themselves as a voluntary partnership organization (authorized by the laws of the State of Pennsylvania) under the name of the Pittsburgh Melting Company, for the purpose of the manufacture and sale of oleomargarine or butterine, it being an article manufactured out of oleaginous substances and compounds

other than that produced from unadulterated milk or cream from the same, and designed to take the place of butter produced from unadulterated milk or cream. That on the tenth day of May, 1881, and prior thereto, there was no statute or law in the State of Pennsylvania prohibiting such manufacture and sale, but on the contrary thereof, there was in force an act of the General Assembly of the State of Pennsylvania, entitled "An act to prevent deception in the sale of butter and cheese," approved May 22d, 1878, and that subsequent thereto, the General Assembly of this State passed and the Governor approved an act entitled "An act for the protection of dairymen and to prevent deception in the sale of butter and cheese," and said act being approved May 24th, 1883, and with this offer the defendants offer in evidence each of the said acts.

That for the purpose of the manufacture of the said oleomargarine and butterine, the said defendants under the name of the Pittsburgh Melting Company purchased a large quantity of machinery in the years 1881, 1882, and 1883, especially made for and adapted to the manufacture of the said oleomargarine or butterine, and erected the said machinery in a building for that purpose; and prior to the 1st day of January, A. D. 1885, the said defendants under the name of the Pittsburgh Melting Company had invested in said machinery a sum of money exceeding $20,000, of which sum the defendant Hay Walker contributed ($10,000) ten thousand dollars.

That the said defendants continued to manufacture with the said machinery said oleomargarine or butterine and to sell said manufactured product up and until and including the twenty-first day of May, 1885, at which time an act was passed by the General Assembly of the State of Pennsylvania, and approved by the Governor of said State, entitled "An act for the protection of the public health and to prevent adulteration of dairy products and fraud in the sale thereof," which act the defendants offer in evidence, it being the same act under which the indictment in this case is found.

That after the passage and approval of the said act of May 21st, 1885, the said defendants continued just as before its passage to manufacture by the use of the said machinery, but not otherwise, said oleomargarine or butterine and to sell the same, and the identical package of oleomargarine or butterine which was sold to the prosecuting witness was manufactured by the said defendant subsequent to the twenty-first day of May, 1885, but solely by the use of the said machinery purchased as aforesaid, prior to said twenty-first day of May, 1885.

That said defendants in the carrying on of their said business, and in the manufacture of the said oleomargarine or butterine, and in the manufacture of the identical package of oleomargarine or butterine hereinbefore specified, which was sold to the prosecuting witness in this case, used only pure animal fats; that the process of its manufacture was clean and wholesome; that the articles manufactured contained the same elements as pure butter; that the only difference between them is that the manufactured article contains smaller proportion of a fatty substance which is known as butterine; that this butterine exists in pure butter in the proportion of from three to seven per cent. and in the manufactured article in a smaller proportion, and this was increased in the manufactured article by the introduction of milk and cream.

That this having been done, the article sold and maufactured contains all the elements of pure butter produced from pure unadulterated milk or cream from the same, except that the percentage of butterine is slightly smaller; that the only effect of butterine is to give flavor to the butter, and it has nothing to do with its wholesomeness; that the oleaginous substances in the manufactured article are substantially identical with those produced from milk or cream, and that the article manufactured and sold by the defendants to the prosecuting witness is a wholesome and nutritious article of food, made as hereinbefore stated by the use of machinery and appliances purchased and owned by said defendants prior to the twenty-first day of May,

1885, and that the said butterine or oleomargarine as manufactured and sold to the prosecuting witness, was in all respects as wholesome and healthful as butter produced from pure unadulterated milk or cream frem the same.

That the said act of May 21st, 1885, prevents the said defendants from using the said machinery, as aforesaid, for the manufacture of oleomargarine or butterine, and that by such deprivation the said machinery is much depreciated in value and rendered almost useless, and instead of being worth the sum of $20,000, as it would be if used for the said purposes for which it was made or used, it is rendered of much less value, being worth only the sum of $5000.

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127-699

In the Supreme Court of the United States.

HAY WALKER, Jr, JOHN H. WILSON, GEORGE HASLY, EMIL WINTER and HARVEY WILSON,

Plaintiffs in Error,

vs.

THE COMMONWEALTH OF PENNSYLVANIA,

Defendant in Error.

No. 1303 October Term, 1888.

Error to the Supreme Court of Pennsylvania.

Motion to Argue this Case with the Case of Powell vs. Commonwealth of Pennsylvania, No. 914, October Term, 1887.

In the Supreme Court of the United States.

HAY WALKER, JR., JOHN H. WILSON, GEORGE HASLY, EMIL WINTER and HARVEY WILSON, *Plaintiffs in Error.*

vs.

THE COMMONWEALTH OF PENNSYLVANIA, *Defendant in Error.*

No.—— OCTOBER TERM, 1888.

ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

And now, December 5, 1887, come counsel for the plaintiff in error, and move the Court that this case be heard together with and at the same time as the case of Powell *vs.* Commonwealth of Pennsylvania, No. 914, October Term, 1887, which was advanced and fixed for first day after Christmas Holidays, after No. 887.

REASONS.

(1). Both cases raise the same question for the decision of this Court, and that is this:

Is the act of the State of Pennsylvania prohibiting the manufacture and sale of oleomargarine, in conflict with the fourteenth amendment to the Federal Constitution?

It is alleged in each case that it is, because—

(*a*) It denies to the plaintiffs in error in each case the equal protection of the laws of Pennsylvania.

(*b*). It deprives the plaintiffs in error in each case of their liberty, without due process of law.

(*c*). It deprives the plaintiffs in error in each case of their property without due process of law.

An examination of the assignments of error in the Powell case made in the brief filed, opposing the motion to dismiss and affirm, and the assignments of error in this case as shown in the printed record, will demonstrate the correctness of these assertions.

Assignments of error were not returned with the record in Powell's case, and thus far they appear only in the brief referred to.

We do not understand that on a motion of this kind this Court desires a reprint of any portion of the record in the cases to be heard together, but we are certain the brief and record referred to will prove the truth of what we say and if it be denied we respectfully ask the Court to examine the same.

See pages 32-40 Printed Record

We refer to pages 6 and 7 of the brief in Powell's case but cannot give the pages of the printed record in this case, because it has not yet been sent us—though it will be ready for this Court when this motion is submitted.

(2). If it be said that the *record* in Powell's case does not properly raise the Federal question of whether the Pennsylvania law attached is in conflict with the fourteenth amendment or that it does not properly suggest *all the above reasons* why that act is in conflict with the fourteenth amendment, and that this case does, this difference, even if it did exist, is no reason why the cases should not be heard together; *because*—

(*a.*) The reason why the Powell case was advanced was that the question of the conflict between the Pennsylvania act and the fourteenth amendment embarrassed the enforcement of the act in the State courts, where many cases were pending.

To decide the question of whether the Pennsylvania act was so in conflict, this Court advanced the Powell case. If the Powell case does not properly suggest all the reasons why the State act is in conflict with the fourteenth amend-

ment, and this case does, then an argument of the Powell case only would not effect what the State authorities, and, so far as we know, all parties in interest desire, and what we believed this Court intended in advancing the Powell case, a decision of this Court on the question of whether the State act is in conflict with the fourteenth amendment.

(*b.*) The general question in each case is the same, though the facts in the two cases differ in some, we think, unimportant respects.

This being so, we submit the cases should be heard together under the authority of the case of Ableman *vs.* Booth, 18 Howard, 479, when this Court said:

"The two cases ought to be argued together. It would hardly be proper for the Court, when questions of so much interest are concerned, to hear a portion of them at one term and a portion of them at another. All of the questions which are involved in the two cases have grown out of one transaction and depend upon the same facts, and it is impossible to decide one without disposing of the principal question in the other. The Court, therefore, will not hear the argument in these cases separately. They must be argued together."

(*c*). It will do no injustice to the defendant in error in the Powell case. In each case the Commonwealth of Pennsylvania is the defendant in error. In each case she is prosecuting for an infringement of the State act prohibiting the manufacture or sale of oleomargarine.

The counsel who make this motion represent the plaintiffs in error in each case.

We stipulate that we shall ask for no additional time, but will argue both cases as one.

The district attorney of Allegheny county, Penn'a, who represents the State in this case, does not oppose this motion. If the district attorney of Dauphin county, Penn'a, in which the Powell case arose, or the private counsel in that case desires the whole time for oral argument, and the district attorney of Allegheny county desires also to be heard in oral argument (which we under-

stand he does not), then we now stipulate to allow him so much of our time as this Court shall think proper.

Or we are willing to allow such part of our time to the counsel in the Powell case as this Court shall see proper.

We are very desirous that the decision of this Court shall cover the entire question, and on its merits of whether the State act is in conflict with the fourteenth amendment.

By hearing both cases together this will be effected.

Certainly the Commonwealth of Pennsylvania should not object to this.

D. T. WATSON,
WEISS & GILBERT,
Attorneys for plaintiffs in error in this case and also in Powell v. *Commonwealth.*

127-700

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 1411.

PLYANT MAHON, APPELLANT,

vs.

ABNER JUSTICE, JAILOR OF PIKE COUNTY, KENTUCKY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED APRIL 17, 1888.

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1 *Proceedings of the Circuit Court of the United States for the District of Kentucky, at Louisville.*

Present: The Hon. Howell E. Jackson, circuit judge of the United States for the 6th circuit.

In the Matter of PLYANT MAHON, *ex Parte.*

On appeal from district court.

Be it remembered that on the 5th day of April, 1888, came the relator, by his counsel, and filed a transcript of the record of the district court of the United States in this case, which is as follows:

Proceedings of the district court of the United States for the district of Kentucky at a regular term begun and held, at the Federal court hall, in the city of Louisville, on Monday, October 3rd, 1887.

Present: Hon. Jno. W. Barr, judge of the United States for said district.

PLYANT MAHON, *ex Parte.*

On writ *habeas corpus.*

Be it remembered that heretofore, to wit, on the 9th day of February, 1888, came the relator, by Eustace Gibson, Esq., his
2 counsel, and filed the petitions of E. W. Wilson, Governor of West Virginia, and of John Sheppard herein, and moved the court to grant him a writ of *habeas corpus* herein; came also the State of Kentucky, by J. Proctor Knott and P. W. Hardin, and entered her appearance to said motion; and, on its motion, it is ordered that said motion for writ of *habeas corpus* be continued until to-morrow morning at 10 o'clock.

The petitions above referred to are as follows:

In the District Court of the United States for the District of Kentucky.

To the Hon. John W. Barr, judge of said court:

Your petitioner, E. W. Wilson, Governor of the State of West Virginia, and on behalf of said State, respectfully represents that during the month of September, 1887, a requisition was made upon petitioner, as Governor aforesaid, by his excellency S. B. Buckner, Governor of the State of Kentucky, for Plyant Mahon, alleged to have committed murder in the State of Kentucky, fled from justice, and to be then going at large in the State of West Virginia; that, pending correspondence between his excellency S. B. Buckner and petitioner and the consideration of legal questions growing out
3 of said requisition, during the month of December, 1887, or January, 1888, while residing and being in said State of West Virginia, contrary to and in violation of the laws thereof and

in violation of the Constitution of the United States and the laws made in pursuance thereof and without warrant or other legal process whatever, Plyant Mahon, who then was and had been for a long time previous thereto a citizen of said State of West Virginia, was by a large body of armed men from the State of Kentucky, with force and arms, arrested and forcibly conveyed against his will from and out of said State of West Virginia and into the county of Pike, State of Kentucky, and then and there confined in the jail of said Pike county, and has ever since been and still is against his will and protest confined in said jail and deprived of his liberty by the keeper of the jail thereof, whose name is unknown to petitioner.

Your petitioner further represents that on the 1st day of February, 1888, as Governor of the State of West Virginia, and on behalf thereof, he, petitioner, for the reason hereinbefore set forth, made his requisition upon his excellency S. B. Buckner, Governor of the
State of Kentucky, demanding that said Plyant Mahon be
4 released from said confinement, set at large, and conveyed
and returned in safety to the State of West Virginia; that said requisition was presented to his excellency S. B. Buckner, Governor as aforesaid, on or about the 2nd day of February, 1888, and on the 4th day of said month said demand was by him refused on the ground, amongst others, that the questions involved were judicial and not executive.

Your petitioner, therefore, in vindication of the rights of the State of West Virginia and each and every citizen thereof, and especially of the said Plyant Mahon, so confined and deprived of his liberty, to the end that that due process of law secured by both the Constitution of the United States and the constitution of the State of West Virginia and the laws made in pursuance thereof shall be respected and enforced, prays that the writ of *habeas corpus* may be granted, directed to the keeper of said jail, commanding him to produce the body of the said Plyant Mahon, together with the cause of his detention, before your honor at such time and place as may be designated in said writ, and that judgment be made, entered, and
executed discharging and releasing said Plyant Mahon from
5 said confinement and custody and safely returning him to
and within the jurisdiction of the State of West Virginia; and petitioner will ever pray, etc.

In witness whereof I have hereunto affixed my name and the great seal of the State of West Virginia, at the city of Charleston, West Virginia, this 6th day of February, in the year of our Lord 1888, and of the State the twenty-fifth.

[L. S.]

E. W. WILSON,
Governor W. Va.

By the Governor:
HENRY S. WALKER,
Secretary of State.

In the District Court of the United States for the District of Kentucky.

To the Hon. John W. Barr, judge of said court:

Your petitioner, Jno. A. Sheppard, respectfully represents that he is a citizen of the State of West Virginia; that during the month of December, 1887, or January, 1888, while residing and being in said State, contrary to and in violation of the laws thereof and in violation of the Constitution of the United States and the laws made in pursuance thereof and without warrant or other legal process whatsoever, Plyant Mahon, a citizen of said State, was by a large
6 body of armed men from the State of Kentucky, with force and arms, arrested and forcibly conveyed against his will from and out of said State of West Virginia and into the county of Pike, State of Kentucky, and then and there confined in the jail of said Pike county, and has ever since been and still is against his will and protest confined in said jail and deprived of his liberty by the keeper thereof, whose name to petitioner is unknown.

And your petitioner further says that he has reasonable grounds to believe and does believe that the said Plyant Mahon in his present position is in imminent danger of assassination or great bodily harm at the hands of an organized and armed body of men now residing and being in said Pike county, and that said danger will be greatly increased if it be known by them that legal steps are being taken for the release of said Plyant Mahon, and that said armed body of men will immediately receive such knowledge if it be required that said Plyant Mahon shall verify this or any like petition at said jail or in said Pike county.

Your petitioner further represents that on the first day of February, 1888, his excellency E. W. Wilson, Governor of the
7 State of West Virginia, and on behalf of said State, for the reasons hereinbefore set forth, made his requisition upon his excellency S. B. Buckner, Governor of the State of Kentucky, demanding that said Plyant Mahon be released from said confinement, set at large, and conveyed and returned in safety to the State of West Virginia; that said requisition was presented to his excellency S. B. Buckner, Governor as aforesaid, on or about the 2nd day of February, 1888, and on the 4th day of said month said demand was by him refused on the ground, amongst others, that the questions involved were judicial and not executive.

Wherefore, and since the said Plyant Mahon is remediless save in a court or before a judge thereof, in vacation, having proper cognizance of the matter, your petitioner prays that the writ of *habeas corpus* may be granted, directed to the said keeper of said jail, commanding him to produce the body of said Plyant Mahon, together with the cause of his detention, before your honor at such time and place as may be designated in said writ, and that judgment be made, entered, and executed discharging and releasing said Plyant Mahon from said confinement and custody and safely return- him to and

within the jurisdiction of the State of West Virginia; and
8 your petitioner will ever pray, &c.

JNO. A. SHEPPARD.

STATE OF WEST VIRGINIA, } *sct:*
County of Kanawha, }

Taken, signed, and sworn to before me, John B. Floyd, a notary public for said county, by said John A. Sheppard, whose name is signed to the foregoing petition, this sixth day of February, 1888.

In witness whereof I have hereunto affixed my hand and notarial seal the day and date above written.

[L. S.] JOHN B. FLOYD,
Notary Public.

And on another day of said term of said court, to wit, on Fryday, February 10th, 1888, came the relator, by his attorney; came also the State of Kentucky, by its attorneys. The court being now fully advised of the motion for the writ of *habeas corpus* herein, it is, therefore, considered by the court that said motion be, and the same is hereby, sustained.

It is further considered by the court that said writ be made returnable on the 20th inst. The writ above referred to is as follows:

The President of the United States of America to the jailer of Pike county, Kentucky, Greeting:

9 You are hereby commanded to produce before the district court of the United States for the district of Kentucky, at the Federal court hall, in the city of Louisville, on the 20th day of February, 1888, at 10 o'clock a. m., the body of the within-named Plyant Mahon, illegally detained by you as alleged, together with the nature and cause of his detention, then and there to abide by such order as shall be made in the premise-, and that you have then and there this writ; and this you shall in nowise omit under the pains and penalties in such case provided.

Witness the Hon. John W. Barr, judge of the district court of the United States, at Louisville, in the said district, this 10th day of February, in the year of our Lord 1888, and of our Independence the 112th.

[L. S.] SAM'L B. CRAIL, *Clerk*,
By HENRY F. CASSIN, *Deputy*.

Upon which the marshal made the following return:

Executed the within writ of *habeas corpus* by delivering a true copy thereof to P. A. Cline, the deputy jailer of Pike county, Ky., at Pikeville, Pike county, Ky., this — day of February, 1888.

A. J. GROSS, *U. S. M., Ky.*,
By J. V. McDONALL, *D. M.*

10 And on another day of said term of said court, to wit, on Monday, February 13th, 1888, on motion of the attorney representing the Commonwealth of Kentucky, the United States mar-

shal for the district of Kentucky is directed and required to take custody of the prisoners ment-oned in the writs issued herein on the 10th day of the present month, at the jail of Pike county, and transport them to the city of Louisville, where he shall hold them subject to the order of this court, and the jailer to whom said writ was directed shall make return in person to said writs, in this court, on Saturday, the 25th day of this month; and the order made and the writ heretofore issued herein are modified accordingly.

A true copy.

Witness my hand and seal of said court this 13th day of February, 1888.

[L. S.] SAM'L B. CRAIL, *Clerk*,
By HENRY F. CASSIN, *Deputy*.

Upon which the marshal made the following return:

Executed the within order by reading same to P. A. Cline, deputy jailer of Pike county, Ky., at Catlettsburg, Boyd Co., Ky., and taking into my custody the within-named D. D. Mahon, Selkirk McCoy,
Plyant Mahon, Moses Christian, Thos. Chambers, Samuel
11 Mahon, L. D. McCoy, Andrew Varney, and Valentine Hatfield, February 15th, 1888, and delivering them to the jailer of Jefferson county, Ky., February 16th, 1888.

A. J. GROSS, *U. S. M., Ky.*,
By J. V. McDONALD, *D. M.*

And at another term of our said court, held for its February term, 1888, to wit, on Saturday, 25th, 1888, this day the respondent, Abner Justice, by his attorneys, made his return to the writ of *habeas corpus* herein.

Came also A. J. Gross, United States marshal, and made his return to the order of the 13th day of February, 1888, and also produced in court the body of the relator.

Thereupon the relator, by his attorney, filed his affidavit in the nature of a response to the return of the respondent herein.

Came again the respondent, by his attorneys, and moves the court to reform the affidavit or response of the relator herein by striking out therefrom the following parts, viz: "But, on the contrary, affiant states the following to be the facts with respect to his arrest and confinement aforesaid: That on the 10th day of September, 1887,
his excellency S. B. Buckner, Governor of the State of Ken-
12 tucky, made a requisition upon his excellency E. W. Wilson, Governor of the State of West Virginia, for the surrender of your petitioner, to answer a charge said to have been made against him in the county of Pike, in the State of Kentucky, for a murder alleged to have been committed therein some time in the year 1882, and alleging that your petitioner was a fugitive from the justice of said State of Kentucky; that the said keeker of the jail of said county prepared and one Frank Phillips made the affidavit required by law to accompany said requisition, and the said Frank Phillips was made and designated by his excellency the Governor of Ken-

tucky aforesaid the agent of said State to receive your petitioner from the State of West Virginia; that said requisition was delivered to his excellency the said Governor of West Virginia on the — day of Sept., 1887, and he directed the issuance of his warrant for your petitioner as therein demanded. This fact was officially communicated to the said Frank Phillips, agent as aforesaid, on the 21st day of November, 1887; thereupon the said Phillips, in his capacity as agent aforesaid, to wit, on the 13th day of December, 1887, declined to take the warrant aforesaid for the arrest and delivery of your petitioner to the authorities of Pike county, Kentucky,
13 by reason of which said warrant was not issued, all of which facts were known to the said Cline, the keeper of the jail of said Pike county, and to all the other officers of said county.

"Affiant further says that his said arrest and confinement was not made and being secured to have him answer to said charge of murder alleged to have been preferred against him as aforesaid and to serve the ends of public justice, but, on the contrary, your petitioner alleges that it is in pursuance of a combination and conspiracy between the said Phillips and the said Cline to extort money from your affiant. Affiant solemnly avers that he is not guilty of any homeside or other felony nor of any crime or misdemeanor in said Pike county, in the State of Kentucky; that he is entirely innocent of any charge or pretended charge that the said Frank Phillips, the said jailer, or any authority of said county of Pike, have made or may make against him; that his excellency E. W. Wilson, Governor of the State of West Virginia, being informed of affiant's illegal arrest and confinement aforesaid, on behalf of the State of West Virginia, on the 1st day of Feb'y, 1888, for the reasons hereinbefore stated, made his requisition upon his excellency S. B. Buckner, Governor of the State of Kentucky, demanding that
14 affiant be released from said confinement, set at large, conveyed and returned in safety to the State of West Virginia; that said requisition was presented to his excellency the said Governor of Ky., and on the 4th day of Feb'y, 1888, said demand was by him refused."

The court, having heard arguments upon and considered said motion, sustains said motion in part and directs the striking from said response the following words, viz: "Affiant further says that his said arrest and confinement was not made and being secured to have him answer to said charge of murder alleged to have been preferred against him as aforesaid and to serve the ends of public justice, but, on the contrary, your petitioner alleges that *is* is in pursuance of a combination and conspiracy between the said Phillips and the said Cline to extort money from your affiant. Affiant solemnly avers that he is not guilty of any homecide or other felony nor of any crime or misdemeanor in said Pike county, in the State of Ky.; that he is entirely innocent of any charge or pretended charge that the said Frank Phillips, the said jailer, or any authority of the said county of Pike, have made or may make against him;" to which ruling of the court the relator excepts.

15 And it is considered by the court that the remainder of said motion be and is overruled; to which the respondents excepts.

The return of the jailer to the writ of *habeas corpus*, above referred to, is as follows:

Abner Justice, jailer of Pike county, in the State of Kentucky, in obedience to the writ of *habeas corpus* hereto annexed, makes return hereof and certifies to said court that at the time said writ was issued and when the same was served upon him he, as jailer of Pike county, Kentucky, held said Plyant Mahon in custody and confined in the jail of said county under, by virtue of, and in obedience to three writs issued by the clerk of the criminal court of said county by order of the said court, each for the arrest of him, said Plyant Mahon, to answer an indictment then pending in said court against him, the said Plyant Mahon, and others, for the crime of willful murder, alleged to have been committed in said county—a crime for the trial of which said court had full jurisdiction in said county—and commanding the officer so arresting said Plyant Mahon to deliver him to the jailer of said county; copies of which said writs and also of the returns of the officer who executed the same
16 by arresting the said Plyant Mahon in pursuance thereof are hereto annexed as part hereof, marked, respectively, 1, 2, and 3; that in obedience to said writ of *habeas corpus* he, the said jailer, started to bring the said Plyant Mahon to the city of Louisville in order to produce his body before the district court of the United States, as by said writ commanded, but when he reached Catlettsburg the United States marshal for the district of Kentucky, by virtue of an order of said court, a copy of which is hereto annexed (marked A), took said Plyant Mahon into his custody and still holds him in custody, subject to the orders of said court.

He further certifies that the three indictments against said Plyant Mahon and others for willful murder, hereinbefore referred to, were found by the grand jury of Pike county, Kentucky, and returned into the circuit court of said county at the the September term thereof, 1882, at which time said court had jurisdiction of the crime in said indictments charged; that by order of the said court, made at that and each subsequent term thereof, writs were issued by the clerk thereof for the arrest of said Plyant Mahon to answer said indictments until the criminal court of said county was estab-
17 lished by an act of the General Assembly of Kentucky entitled "An act to establish a criminal court in the 16th judicial district," approved March 17th, 1884, by which act the jurisdiction theretofore vested in and exercised by the said circuit court was transferred to and vested in the said criminal court.

That by order of said criminal court, from term to term, writs were issued by the clerk thereof for the arrest of said Plyant Mahon to answer said indictments for willful murder, but none of them were executed upon him, the said Plyant Mahon, until January 12th, 1888, when he was arrested in Pike county, Kentucky, by the sheriff thereof, and delivered by him to the said Abner Justice,

jailer of said county, by virtue of and in obedience to the writs of which copies are herewith filed, as aforesaid, marked 1, 2, and 3, respectively, and under the command and authority of which he was held by said jailer in custody in the jail of said county when the writ of *habeas corpus*, herewith returned, was issued and at the time it was served upon him, the said jailer, as aforesaid.

And that the court may be more fully advised touching the true cause of the detention of the said Plyant Mahon by him as jailer as aforesaid he files herewith certified copies of the records
18 of the said circuit and criminal courts, marked, respectively, C, D, and E, and makes the same part hereof.

Given under my hand this 20th day of February, 1888.

ABNER JUSTICE,
Jailer of Pike County, Kentucky.
By P. S. CLINE,
Deputy Jailer of Pike County, Ky.

Exhibit marked No. 1, referred to above, is as follows:

Pike Circuit Court.

The Commonwealth of Kentucky to any sheriff, constable, justice, marshal, or policeman of the Commonwealth of Kentucky:

You are hereby commanded forthwith to arrest Anderson Hatfield, Johnson Hatfield, Cap. Hatfield, Valentine Hatfield, Elias Hatfield, C. Carpenter, Jo. Murphy, Doc. Mayhorn, Plyant Mayhorn, Selkirk McCoy, Albert McCoy, "Kirk's son," L. D. McCoy, "Kirk's son," Thos. Chambers, Lark Varney, "Henderson'- son," Andy Varney, "Henderson'- son," Daniel Whitt, Sam. Mayhorn, Alex. Mercer, John Whitt, and Elijah Moonts, "Beech Creek," and bring them before the Pike criminal circuit court court to answer an indictment in that court against them for willful murder; or, if the court be adjourned for that term, that you deliver them to the jailer of Pike county.

19 Given under my hand, as clerk of said court, this 5th day of December, 1887.

W. G. PINSON, *Clerk.*

Exhibit No. 1 is endorsed as follows:

Executed this warrant on Doc. Mayhorn, Plyant Mayhorn, Sam. Mayhorn, Valentine Hatfield, L. D. McCoy, "Kirk's son," and Andy Varney by arresting each of them and delivering them, together with copies of the bench warrant, to the jailer of Pike county Jan'y 12th, 1888.

B. HATFIELD, *S. P. C.*,
By C. T. YOST, *D. S.*

Exhibit marked No. 2, referred to above, is as follows:

Pike Circuit Court.

The Commonwealth of Kentucky to any sheriff, constable, justice, marshal, or policeman of the Commonwealth of Kentucky:

You are hereby commanded forthwith to arrest Anderson Hatfield, Johnson Hatfield, Cap. Hatfield, Valentine Hatfield, Elias Hatfield, C. Carpenter, Jo. Murphy, Doc. Mayhorn, Plyant Mayhorn, Selkirk McCoy, Albert McCoy, "Kirk's son," L. D. McCoy, "Kirk's son," Thos. Chambers, Lark Varney, "Henderson'- son," Andy Varney, "Henderson'- son," Daniel Whitt, Sam. Mayhorn, Alex. Mercer, John Whitt, and Elijah Moonts, "Beech Creek," and bring them before the Pike criminal circuit court to answer an indictment in that court against them for willful murder; or, if the court be adjourned for that term, that you deliver them to the jailer of Pike county.

20 Given under my hand, as clerk of said court, this 5th day of Dec., 1887.

G. W. PINSON, *Clerk.*

Exhibit No. 2 is endorsed as follows:

Executed this warrant on Doc. Mayhorn, Plyant Mayhorn, Sam. Mayhorn, Valentine Hatfield, L. D. McCoy, "Kirk's son," and Andy Varney by arresting each of them and delivering them, together with copies of the bench warrant, to the jailer of Pike county Jan'y 12th, 1888.

B. HATFIELD, *S. P. C.*,
By C. T. YOST, *D. S.*

Exhibit marked No. 3, referred to above, is as follows:

Pike Circuit Court.

The Commonwealth of Kentucky to any sheriff, constable, justice, marshal, or policeman of the Commonwealth of Kentucky:

You are hereby commanded forthwith to arrest Anderson Hatfield, Johnson Hatfield, Cap. Hatfield, Valentine Hatfield, Elias Hatfield, C. Carpenter, Jo. Murphy, Doc. Mayhorn, Plyant Mayhorn, Selkirk McCoy, Albert McCoy, "Kirk's son," L. D. McCoy, "Kirk's son," Thos. Chambers, Lark Varney, "Henderson'- son," Andy Varney, "Henderson'- son," Daniel Whitt, Sam. Mayhorn, Alex. Mercer, John Whitt, Elijah Moonts, "Beech Creek," and bring them before the Pike criminal circuit court to answer an indictment in that court against them for willful murder; or, if the court be ad-

21 journed for that term, that you deliver them to the jailer of Pike county.

Given under my hand, as clerk of said court, this 5th day of December, 1887.

G. W. PINSON, *Clerk.*

Exhibit No. 3 is endorsed as follows:

Executed this warrant on Doc. Mayhorn, Plyant Mayhorn, Sam. Mayhorn, Valentine Hatfield, L. D. McCoy, "Kirk's son," and Andy Varney by arresting each of them and delivering them, together with copies of the bench warrant, to the jailer of Pike county Jan'y 12th, 1888.

B. HATFIELD, *S. P. C.*,
By C. T. YOST, *D. S.*

Exhibit A, referred to above, is as follows:

In the District Court of the United States for the District of Kentucky.

Ex Parte PLYANT MAHON.

MONDAY, *February* 13*th*, 1888.

On motion of the attorneys representing the Commonwealth of Kentucky, the United States marshal for the district of Kentucky is directed and required to take custody of the prisoner mentioned in the writ issued herein, on the 10th day of the present month, at the jail of Pike county, and transport him to the city of Louisville, where he shall hold him subject to the order of this court; and the jailer, to whom said writ was directed, shall make return in person to said writ in this court on Saturday, the 25th day of this
22 month, and the order made and the writ heretofore issued herein are modified accordingly.

A true copy.

Witness my hand and seal of said court this 13th day of February, 1888.

[L. S.] SAM'L B. CRAIL, *Clerk*,
By HENRY F. CASSIN, *Deputy*.

Exhibit C, referred to above, is as follows:

Pike Circuit Court.

At a circuit court commenced and held for Pike county, at the court-house, in the town of Pikeville, on Monday, September the 4th, 1882—present, G. N. Brown, judge—the sheriff returned the names of following grand jurors, to wit: Jeremiah Osborne, Isaac Robinson, Love Childers, Wm. Thompson, G. M. D. Bevins, Richard Staton, Jacob Blackburn, H. M. Dougherty, James H. Scott, J. D. Maynard, Eph. Moore, John Charles, Wm. A. Justice, George J. Cortney, H. Williamson, and Jack Mullins, who were sworn, as required by law; and H. Williamson, on his motion, is reli-ved, and the sheriff summoned W. O. B. Ratliff as grand juror, to fill said vacancy, who took the oath as required by law.

Ordered, That W. O. B. Ratliff be appointed foreman of the grand jury for the present term.

Pike Circuit Court. September Term, 1882.

23 The grand jury returned the following indictments, which are ordered to be filed, to wit:

COMMONWEALTH
vs.
ANDERSON HATFIELD, CAP. HATFIELD, JOHNSON HATFIELD, VALENTINE Hatfield, Elias Hatfield, C. Carpenter, Joseph Murphy, Doc. Mayhorn, Plyant Mayhorn, Selkirk McCoy, Albert McCoy (Kirk's son), L. D. McCoy (Kirk's son), Thos. Chambers, Lark Varney (Henderson'- son), Andy Varney (Henderson'- son) Daniel Whitt, Samuel Mayhorn, Alex. Messer, John Whitt, Elijah Moonts (Beech Creek).

Murder.

Bench warrents awarded.

Indictment.

Pike Circuit Court.

THE COMMONWEALTH OF KENTUCKY, Plaintiff,
against
ANDERSON HATFIELD, JOHNSON HATFIELD, CAP. HATFIELD, VALENTINE Hatfield, Elias Hatfield, C. Carpenter, Joseph Murphy, Doc. Mayhorn, Plyant Mayhorn, Selkirk McCoy, Albert McCoy (Kirk's son), L. D. McCoy (Kirk's son), Thomas Chambers, Lark
24 Varney (Henderson'- son), Andy Varney (Henderson'- son), Daniel Whitt, Samuel Mayhorn, Alex. Messer, John Whitt, Elijah Mounts (Beech Creek).

The grand jury of Pike county, in the name and by the authority of the Commonwealth of Kentucky, accuse Anderson Hatfield, Johnson Hatfield, Cap. Hatfield, Valentine Hatfield, Elias Hatfield, C. Carpenter, Joseph Murphy, Doc. Mayhorn, Plyant Mayhorn, Selkirk McCoy, Albert McCoy, L. D. McCoy, Thomas Chambers, Lark Varney, Andy Varney, Daniel Whitt, Sam. Mayhorn, Alex. Messer, John Whitt, and Elijah Mounts of the crime of willful murder, committed as follows: The said defendants, as hereinbefore named, on the 9th day of August, 1882, in the county and circuit aforesaid, did, willfully, feloniously, and of their malice aforethought, kill, slay, and murder Pharmer McCoy by shooting him with a gun or pistol loaded with powder and ball—the precise weapon, whether gun or pistol, is unknown to the grand jurors—from which shooting he then and there immediately died, and to commit which murder the defendants aforesaid did conspire together.

25 Each of the aforesaid defendants, as hereinbefore named, was present*ed* at the commission of the said murder and did willfully, feloniously, and of their malice aforethought, aid, abet, counsel, and advise in the commission of said murder of the said Pharmer McCoy hereinbefore described; to commit the said murder

the aforesaid defendants did conspire together, against the peace and dignity of the Commonwealth of Kentucky.

S. G. KINNER,
Commonwealth Attorney.

A true bill.

W. O. B. RATLIFF, *Foreman.*

Filed Sept. 14th, 1882.

R. M. FENELL,
C. P. C. C.

Bench Warrant. Issued Sept. 18th, 1882.

Commonwealth witnesses: Jacob Pucket, Mathen Hatfield, Anderson Hatfield (George's son), Richard Hatfield, James McCoy, Talbert Hatfield, Lewis Farley, Joseph Hatfield, Samuel McCoy, James Francisco, Anderson T. Fenell, John C. Frances, Samuel Simkins, Harriett Simkins, Uriah McCoy (Punis' son), George Sprouse, Floyd Hatfield, Mont Stafford, Scott Allen, Sarah McCoy.

S. G. KINNER,
Commonwealth Att'y.

The grand jury reported the following indictments, which *is* ordered to be filed:

Pike Circuit Court. Sept. Term, 1882.

26 COMMONWEALTH
vs.
ANDERSON HATFIELD, JOHNSON HATFIELD, CAP. HATFIELD, VALENTINE Hatfield, Elias Hatfield, C. Carpenter, Joseph Murphy, Doc. Mayhorn, Plyant Mayhorn, Silkirk McCoy, Albert McCoy (Kirk's son), L. D. McCoy (Kirk's son), Thomas Chambers, Lark Varney (Henderson'- son), Andy Varney (Henderson'- son), Daniel Whitt, Samuel Mayhon, Alexander Messer, John Whitt, Elijah Mounts (Beech Creek).

Murder.

Bench warrants awarded.

Pike Circuit Court.

Commonwealth of Kentucky to any sheriff, constable, coroner, justice, marshal, or policeman of the Commonwealth of Kentucky:

You are hereby commanded forthwith to arrest Anderson Hatfield, Johnson Hatfield, Cap. Hatfield, Valentine Hatfield, Elias Hatfield, C. Carpenter, Joseph Murphy, Doc. Mayhorn, Plyant Mayhorn, Selkirk McCoy, Albert McCoy (Kirk's son), L. D. McCoy (Kirk's son), Thomas Chambers, Lark Varney, Andy Varney, Daniel Whitt, Samuel Mayhorn, Alexander Messer, John Whitt, and Elijah Mounts (Beech Creek) and bring them before the Pike circuit court to answer an indictment in that court against them for murder; or,

if the court be adjourned for that term, that you deliver them to the jailer of Pike county.

27 Given under my hand, as clerk of said court, this 18th day of Sept., 1882.

R. M. FENELL, *Clerk.*

Not found in this county Feb'y 19th, 1883.

J. M. FERGUSON, *S. P. C.*

Pike Circuit Court. M'ch Term, 1883.

COMMONWEALTH *vs.* ANDERSON HATFIELD & Others.

Willful murder.

Alias bench warrants & continued.

Pike Circuit Court.

Commonwealth of Kentucky to any sheriff, constable, coroner, justice, marshal, or policeman of the Commonwealth of Kentucky:

You are hereby commanded forthwith to arrest Anderson Hatfield, Johnson Hatfield, Cap. Hatfield, Valentine Hatfield, Elias Hatfield, C. Carpenter, Joseph Murphy, Doc. Mayhorn, Plyant Mayhorn, Selkirk McCoy, Albert McCoy (Kirk's son), L. D. McCoy (Kirk's son), Thomas Chambers, Lark Varney, Andy Varney, Daniel Whitt, Samuel Mayhorn, Alex. Messer, John Whitt, and Elijah Mounts (Beech Creek) and bring them before the Pike circuit court to answer on indictment in that court against them for murder; or, if the court be adjourned for that term, that you deliver them to the jailer of Pike county.

Given under my hand, as clerk of said court, this 10th day of April, 1883.

R. M. FENELL, *Clerk,*

28 By T. F. RATLIFF, *D. C.*

Not found in Pike county this 27th day of August, 1883.

JOE RAMEY, *S. P. C.*

Pike Circuit Court. Sept. Term, 1833.

COMMONWEALTH *vs.* ANDERSON HATFIELD and Others.

Murder.

Alias B. W. & continued.

Pike Circuit Court.

The Commonwealth of Kentucky to any sheriff, constable, coroner, justice, marshal, or policeman in this State:

You are hereby commanded forthwith to arrest Anderson Hatfield, Johnson Hatfield, Cap. Hatfield, Valentine Hatfield, Elias Hatfield, C. Carpenter, Joseph Murphy, Doc. Mayhorn, Plyant Mayhorn

Selkirk McCoy, Albert McCoy (Kirk's son), L. D. McCoy (Kirk's son), Thomas Chambers, Lark Varney (H.'s son), Andy Varney (H.'s son), Daniel Whitt, Sam. Mayhorn, Alexander Messer, John Whitt, Elijah Mounts (Beech Creek) and bring them before the Pike circuit court to answer an indictment in that court against them for murder; or, if the court be adjourned for that term, that you deliver them to the jailer of Pike county.

Given under my hand, as clerk of said court, this 6th day of Oct., 1883.

R. M. FENELL,
Clerk P. C. C.

Not found in this county Feb'y 19th, 1884.
29 SAM. DANIELS, *S. P. C.*

Pike Circuit Court. March Term, 1884.

COMMONWEALTH *vs.* ANDERSON HATFIELD & Others.

Murder.

Alias bench warrants & continued.

Pike Circuit Court.

Commonwealth of Kentucky to any sheriff, constable, coroner, justice, marshal, or policeman of the Commonwealth of Kentucky:

You are hereby commanded forthwith to arrest Anderson Hatfield, Johnson Hatfield, Cap. Hatfield, Valentine Hatfield, Elias Hatfield, C. Carpenter, Joseph Murphy, Doc. Mayhorn, Plyant Mayhorn, Selkirk McCoy, Albert McCoy (Kirk's son), L. D. McCoy (Kirk's son), Thomas Chambers, Lark Varney and Andy Varney (Henry'- sons), Daniel Whitt, Samuel Mayhorn, Alex. Messer, John Whitt, Elijah Mounts (Beech Creek) and bring them before the Pike criminal court to answer an indictment in that court against them for willful murder; or, if the court be adjourned for that term, that you deliver them to the jailer of Pike county.

Given under my hand, as clerk of said court, this 22nd day of M'ch, 1884.

R. M. FINELL, *Clerk*,
By T. F. RATLIFF, *D. C.*

Not found in this county this May the 1st, 1884.
S. R. DANIELS, *S. P. C.*,
By J. M. FERGUSON, *D. S.*

30 Pike Criminal Court. May Term, 1884.

COMMONWEALTH *vs.* ANDERSON HATFIELD & Others.

Murder.

Alias B. W. & cont.

Pike Criminal Court.

The Commonwealth of Kentucky to any sheriff, constable, coroner, justice, marshal, or policeman in this State:

You are hereby commanded forthwith to arrest Anderson Hatfield, Johnson Hatfield, Capt. Hatfield, Valentine Hatfield, Elias Hatfield, C. Carpenter, Joseph Murphy, Doc. Mayhorn, Plyant Mayhorn, Selkirk McCoy, Albert McCoy (Kirk's son), L. D. McCoy (Kirk's son), Thomas Chambers, Lark Varney (H.'s son), Andy Varney (H.'s son), Daniel Whitt, Sam. Mayhorn, Alexander Messer, John Whitt, Elijah Mounts (Beech Creek) and bring them before the Pike criminal court to answer an indictment in that court against them for willful murder; or, if the court be adjourned for that term, that you deliver them to the jailer of Pike county.

Given under my hand, as clerk of said court, this 3rd day of June, 1884.

R. M. FENELL,
Clerk S. P. C.

Not found in Pike county Aug. 19th, 1884.
W. O. B. RATLIFF, *S. P. C.*,
By S. R. DANIELS, *D. S.*

31 Pike Criminal Court. August Term, 1884.

COMMONWEALTH *vs.* ANDERSON HATFIELD & Others.

Murder.

Alias bench warrant & continued.

Pike Criminal Court.

The Commonwealth of Kentucky to any sheriff, constable, coroner, justice, marshal, or policeman of this State:

You are hereby commanded forthwith to arrest Anderson Hatfield, Johnson Hatfield, Cap. Hatfield, Valentine Hatfield, Elias Hatfield, C. Carpenter, Joseph Murphy, Doc. Mayhorn, Plyant Mayhorn, Selkirk McCoy, Albert McCoy (Kirk's son), L. D. McCoy (Kirk's son), Thomas Chambers, Lark Varney (Henderson's son), Andy Varney (Henderson'- son), Daniel Whitt, Sam. Mayhorn, Alexander Messer, John Whitt, Elijah Mounts (Beech Creek) and bring them before the Pike criminal court to answer an indictment in that court against them for willful murder; or, if the court be adjourned for that term, that you deliver them to the jailer of Pike county.

Given under my hand, as clerk of said court, this 20th day of Sept., 1884.

R. M. FINELL,
Clerk P. C. C.

Not found in this county Feb'y 18th, 1885.
W. O. B. RATLIFF, *S. P. C.*,
By S. R. DANIELS, *D. S.*

Pike Criminal Court. Feb'y Term, 1885.

32 COMMONWEALTH *vs.* ANDERSON HATFIELD & Others.

Murder.

Alias bench warrant & continued.

Pike Criminal Court.

The Commonwealth of Kentucky to any sheriff, constable, coroner, justice, marshal, or policeman of this State:

You are commanded to forthwith arrest Anderson Hatfield, Johnson Hatfield, Cap. Hatfield, Valentine Hatfield, Elias Hatfield, C. Carpenter, Joseph Murph, Doc. Mayhorn, Plyant Mayhorn, Selkirk McCoy, Albert McCoy (Kirk's son), L. D. McCoy (Kirk's son), Thomas Chambers, Lark Varney (Henderson'- son), Andy Varney (Henderson-' son), Daniel Whitt, Samuel Mayhorn, Alexander Messer, John Whitt, Elija Mounts (Beech Creek) and bring the- before the Pike criminal court to answer an indictment in that court against them for murder; or, if the court be adjourned for that term, that you deliver them to the jailer of Pike county.

Given under my hand, as clerk of said court, this 18th day of M'ch, 1885.

R. M. FENELL, *Clerk*,
By T. F. RATLIFF, *D. C.*

Not found in Pike county Aug. 24th, 1885.

B. HATFIELD, *S. P. C.*

Pike Criminal Court. August Term, 1885.

33 COMMONWEALTH *vs.* ANDERSON HATFIELD & Others.

Murder.

Alias bench warrant & continued.

Pike Criminal Court.

Commonwealth of Kentucky to any sheriff, constable, coroner, justice, marshal, or policeman of the Commonwealth of Kentucky:

You are hereby commanded forthwith to arrest Anderson Hatfield, Johnson Hatfield, Cap. Hatfield, Valentine Hatfield, Elias Hatfield, C. Carpenter, Joseph Murphy, Doc. Mayhorn, Plyant Mayhorn, Selkirk McCoy, Albert McCoy (Kirk's son), L. D. McCoy (Kirk's son), Thomas Chambers, Lark Varney (Henderson'- son), Andy Varney (Henderson'- son), Daniel Whitt, Samuel Mayhorn, Alexander Messer, John Whitt, Elija Mounts (Beech Creek) and bring them before the Pike criminal court to answer an indictment in that court against them for murder; or, if the court be adjourned for that term, that you deliver them to the jailer of Pike county.

Given under my hand, as clerk of said court, this 18th day of September, 1885.

R. M. FENELL, *Clerk*,
By T. F. RATLIFF, *D. C.*

Not found in Pike county Feb'y 19th, 1886.
B. HATFIELD, *S. P. C.*

Pike Criminal Court. Feb'y Term, 1886.

34 COMMONWEALTH *vs.* ANDERSON HATFIELD & Others.

Alias bench warrant & continued.

Pike Criminal Court.

Commonwealth of Kentucky to any sheriff, constable, coroner, justice, marshal, or policeman of the Commonwealth of Kentucky:

You are commanded forthwith to arrest Anderson Hatfield, Johnson Hatfield, Cap. Hatfield, Valentine Hatfield, Elias Hatfield, C. Carpenter, Joseph Murphy, Doc. Mayhorn, Plyant Mayhorn, Selkirk McCoy, Albert McCoy (Kirk's son), L. D. McCoy (Kirk's son), Thomas Chambers, Lark Varney (Henderson'- son), Andy Varney (Henderson'- son), Daniel Whitt, Samuel Mayhorn, Alexander Mercer, John Whitt, and Elija Mounts (Beech Creek) and bring them before the Pike criminal court to answer an indictment against them for murder; or, if the court be adjourned for that term, that you deliver them to the jailer of Pike county.

Given under my hand, as clerk of said court, this 30th day of M'ch, 1886.

R. M. FENELL, *Clerk*,
By T. F. RATLIFF, *D. C.*

The def'ts not found in Pike county this Aug. the 23rd, 1886.
B. HATFIELD, *S. P. C.*

Pike Criminal Court. Aug. Term, 1886.

35 COMMONWEALTH *vs.* ANDERSON HATFIELD & Others.

Alias bench warrant & continued.

Commonwealth of Kentucky to any sheriff, constable, coroner, justice, marshal, or policeman of the Commonwealth of Kentucky:

You are hereby commanded to arrest Anderson Hatfield, Johnson Hatfield, Cap. Hatfield, Valentine Hatfield, Elias Hatfield, C. Carpenter, Joseph Murphy, Doc. Mayhorn, Plyant Mayhorn, Selkirk McCoy, Albert McCoy (Kirk's son), L. D. McCoy (Kirk's son), Thomas Chambers, Lark Varney (H.'- son), Andy Varney (H.'- son), Daniel Whitt, Samuel Mayhorn, Alex. Musser, John Whitt, Elija Mounts (Beech Creek) and bring them before the Pike criminal court to answer an indictment in that court against them for murder; or, if the

court be adjourned for that term, that you deliver them to the jailer of Pike county.

Given under my hand, as clerk of said court, this 8th day of Nov., 1886.

G. W. PINSON, *Clerk.*

Not found in Pike county.

B. HATFIELD, *S. P. C.*

Pike Criminal Court. Feb'y Term, 1887.

COMMONWEALTH *vs.* ANDERSON HATFIELD & Others.

Alias bench warrant & continued.

Pike Criminal Court.

36 The Commonwealth of Kentucky to any sheriff, constable, coroner, justice, marshal, or policeman of the Commonwealth of Kentucky:

You are hereby commanded to arrest Anderson Hatfield, Johnson Hatfield, Cap. Hatfield, Valentine Hatfield, Elias Hatfield, C. Carpenter, Joseph Murphy, Doc. Mayhorn, Plyant Mayhorn, Selkirk McCoy, Albert McCoy, L. D. McCoy, Thomas Chambers, Lark Varney, Andy Varney, Daniel Whitt, Samuel Mayhorn, Alex. Musser, John Whitt, and Elijah Mounts (Beech Creek) and bring them before the Pike criminal court to answer an indictment in that court against them for murder; or, if the court be adjourned for that term, that you deliver them to the jailer of Pike county.

Given under my hand, as clerk of said court, this 5th day of May, 1887.

G. W. PINSON, *Clerk.*

Not found in Pike county this Aug. 22nd, 1887.

B. HATFIELD, *S. P. C.*,
By F. PHILIPPS, *D. S.*

Pike Criminal Court. Aug. Term, 1887.

COMMONWEALTH *vs.* ANDERSON HATFIELD & Others.

Alias bench warrant & continued.

Pike Criminal Court.

37 The Commonwealth of Kentucky to any sheriff, constable' coroner, justice, marshal, or policeman of the Commonwealth of Kentucky:

You are hereby commanded to arrest Anderson Hatfield, Johnson Hatfield, Cap. Hatfield, Valentine Hatfield, Elias Hatfield, C. Carpenter, Joseph Murphy, Doc. Mayhorn, Playant Mayhorn, Selkirk McCoy, Albert McCoy (Kirk's son), L. D. McCoy (Kirk's son), Thomas Chambers, Lark Varney (Henderson's son), Andy Varney

(Henderson's son), Daniel Whitt, Samuel Mayhorn, Alexander Mercer, John Whitt, and Elijah Mounts (Beech Creek) and bring them before the Pike criminal court to answer an indictment in that court against them for willful murder; or, if the court be adjourned for that term, that you deliver them to the jailer of Pike county.

Given under my hand, as clerk of said court, this 12th day of December, 1887.

G. W. PINSON, *Clerk.*

Executed the within warrant upon Selkirk McCoy by arresting him and delivering him, together with a copy of this B. warrant, to the jailer of Pike county this the 12th day of Dec., 1887.

B. H. HATFIELD, *S. P. C.*,
By J. S. CLINE, *D. S.*

Pike Criminal Court.

The Commonwealth of Kentucky to any sheriff, coroner, constable, justice, marshal, or policeman of the Commonwealth of Kentucky:

38 You are hereby commanded forthwith to arrest Anderson Hatfield, Johnson Hatfield, Cap. Hatfield, Valentine Hatfield, Elias Hatfield, C. Carpenter, Joseph Murphy, Doc. Mayhorn, Plyant Mayhorn, Selkirk McCoy, Albert McCoy (Kirk's son), L. D. McCoy (Kirk's son), Thomas Chambers, Lark Varney (Henderson's son), Andy Varney (Henderson's son), Daniel Whitt, Samuel Mayhorn, Alexander Merser, John Whitt, and Elijah Mounts (Beech Creek) and bring them before the Pike criminal court to answer an indictment in that court against them for murder; or, if the court be adjourned for that term, that you deliver them to the jailer of Pike county.

Given under my hand, as clerk of said court, this 5th day of December, 1887.

G. W. PINSON, *Clerk.*

Executed this warrant on Doc. Mayhorn, Plyant Mayhorn, Sam. Mayhorn, Valentine Hatfield, L. D. McCoy (Kirk's son), and Andy Varney by arresting each of them and delivering them, together with copies of the bench warrents, to the jailer of Pike Co. Jan'y 12th, 1888.

B. H. HATFIELD, *S. P. C.*,
By C. T. YOST, *D. S.*

STATE OF KENTUCKY, } *sct:*
County of Pike, }

39 I, G. W. Pinson, clerk of the criminal and circuit courts of Pike county, in the State of Kentucky, do hereby certify that the foregoing and annexed 20 pages contain a full, true, and complete transcript of the records and proceedings of the said Pike criminal court in the case therein named, wherein the Commonwealth of Kentucky is plaintiff and Anderson Hatfield, Johnson Hatfield, Cap. Hatfield, Valentine Hatfield, Elias Hatfield, C. Car-

penter, Joseph Murphy, Plyant Mayhorn, Selkirk McCoy, Alber- McCoy (Kirk's son), L. D. McCoy (Kirk's son), Thomas Chambers, Lark Varney (Henderson'- son), Andy Varney (Henderson'- son), Daniel Whitt, Sam'l Mayhorn, Alexander Merser, John Whitt, and Elijah Mounts (Beech Creek), defendants, as fully and completely as the same appears to me among the records and proceedings now on file and remaining in my office.

Given under my hand and seal of said court this 15th day of February, 1888.

[L. S.]

G. W. PINSON,
Clerk Pike Circuit & Criminal Courts.

STATE OF KENTUCKY, }
County of ——, } *sct:*

I, John M. Rice, judge of the criminal court for the 16th judicial district of the State of Kentucky and as such sole judge of the
40 Pike criminal court, one of the courts comprising and embraced within said criminal courts for the 16th judicial district aforesaid, do hereby certify that G. W. Pinson, whose genuine signature appears to the foregoing certificate, is and was, at the time of signing same, clerk of said Pike criminal court, in said State, duly elected and qualified, and that all of his official acts as such are entitled to full faith and credit, and that his attestation is in due form of law and by the proper officer.

Given under my hand this 15th day of February, 1888.

JOHN M. RICE,
Judge of the Criminal Court, 16th Judicial Dist. of Ky.

STATE OF KENTUCKY, }
County of Pike, } *sct:*

I, G. W. Pinson, clerk of the circuit and criminal courts for Pike county, in the State of Kentucky, do certify that John M. Rice, whose genuine signature appears to the foregoing certificate, is and was, at the time of signing same, judge of the criminal court for the 16th judicial district of Kentucky and as such sole judge of the said Pike criminal court, one of the courts embraced within and comprising a part of said criminal court for said 16th judicial district of
41 Kentucky, duly elected, commissioned, and qualified; that all of his official acts as such are entitled to full faith and credit, and that his attestation is in due form of law and by the proper officer.

Given under my hand and seal of said Pike circuit and criminal courts this 15th day of February, 1888.

[L. S.]

G. W. PINSON,
Clerk Pike Circuit & Criminal Courts.

Exhibit "D," above referred to, is as follows:

Pike Circuit Court.

At a circuit court commenced and held for Pike county, at the court-house, in the town of Pikeville, on Monday, September 4th,

1882—present, G. N. Brown, judge—the sheriff returned the names of the following grand jurors, to wit: Jeremiah Osborn, Isaac Robinson, Richard Staten, Jacob Blackburn, H. M. Dougherty, James H. Scott, J. D. Maynard, Eph. Moore, John Charles, Wm. A. Justice, George J. Courtney, H. Williamson, and Jack Mullins; and H. Williamson, on his motion, is relieved, and the sheriff summoned W. O. B. Ratliff as grand juror to fill said vacancy, who took the oath as required by law.

Ordered, That W. O. B. Ratliff be appointed foreman of the grand jury for the present term.

42 The grand jury returned the following indictment-, which are ordered to be filed, to wit:

Pike Circuit Court. Sept. Term, 1882.

COMMONWEALTH
vs.
ANDERSON HATFIELD, JOHNSON HATFIELD, CAP. HATFIELD, VALENTINE Hatfield, Elias Hatfield, C. Carpenter, Joseph Murphy, Doc. Mayhorn, Plyant Mayhorn, Selkirk McCoy, Albert McCoy (Kirk's son), L. D. McCoy (Kirk's son), Thomas Chambers, Lark Varney (Henderson'- son), Andy Varney (Henderson'- son), Daniel Whitt, Samuel Mayhorn, Alex. Merser, John Whitt, Elijah Mounts (Beech Creek).

Murder.

Bench warrant awarded.

Pike Circuit Court.

THE COMMONWEALTH OF KENTUCKY
against
ANDERSON HATFIELD, JOHNSON HATFIELD, CAP. HATFIELD, VALENTINE Hatfield, Elias Hatfield, C. Carpenter, Joseph Murphy, Doc. Mayhorn, Plyant Mayhorn, Selkirk McCoy, Albert McCoy (Kirk's son), L. D. McCoy (Kirk's son), Thomas Chambers, Lark Varney (Henderson'- son), Andy Varney (Henderson'- son), Daniel Whitt, Samuel Mayhorn, Alex. Messer, John Whitt, Elijah Mounts (Beech Creek).

Indictment.

43 The grand jury of Pike county, in the name and by the authority of the Commonwealth of Kentucky, accuse Anderson Hatfield, Johnson Hatfield, Cap. Hatfield, Valentine Hatfield, Elias Hatfield, C. Carpenter, Joseph Murphy, Doc. Mayhorn, Plyant Mayhorn, Selkirk McCoy, Albert McCoy, L. D. McCoy, Thomas Chambers, Lark Varney, Andy Varney, Daniel Whitt, Samuel Mayhorn, Alex. Messer, John Whitt, and Elijah Mounts of the crime of willful murder, committed as follows: The said defendants, as hereinbefore named, on the 19th day of August, 1882, in the county and circuit aforesaid, did willfully, feloniously, and of their malice aforethought kill, slay, and murder Randolph McCoy by shooting

him with a gun or pistol loaded with powder and ball, the precise weapon, whether gun or pistol, *as* unknown to the grand jurors, and from which shooting he, the said Randolph McCoy, then *then* immediately died, and to commit which murder the aforesaid defendants did conspire together. Each of the aforesaid defendants, as hereinbefore named, was presented at the commission of the said murder and did willfully, feloniously, and of their malice
44 aforethought *did* abet, council, and advise in the commission of the said murder of the said Randolph McCoy *and* hereinbefore described. To commit said murder the aforesaid defendants did conspire together, against the peace and dignity of the Commonwealth of Kentucky.

S. G. KINNER,
Commonwealth Attorney.

A true bill.

W. O. B. RATLIFF, *Foreman.*

Filed Sept. 14th, 1882.

R. M. FERRELL, *C. P. C. C.*

Jacob Pucket, Mathen Hatfield, Anderson Hatfield (Geo.'s son), Richard Hatfield, James McClure, Talbert Hatfield, Lewis Farley, Joseph Hatfield, Samuel McCoy, A. M. Hatfield, James Francisco, John C. Francis, Andrew T. Ferrell, Sam'l Simkins, Harriett Simkins, Uriah McCoy (Punis' son), George Sprouse, Floyd Hatfield, Mount Stafford, Scott Allen, Sarah McCoy.

The grand jury reported the following indictments, which are ordered to be filed:

Pike Circuit Court. Sept. Term, 1882.

COMMONWEALTH
vs.
45 ANDERSON HATFIELD, JOHNSON HATFIELD, CAP. HATFIELD, Valentine Hatfield, Elias Hatfield, C. Carpenter, Joseph Murphy, Doc. Mayhorn, Plyant Mayhorn, Selkirk McCoy, Albert McCoy (Kirk's son), L. D. McCoy (Kirk's son), Thomas Chambers, Lark Varney (Henderson'- son), Andy Varney (Henderson'- son), Daniel Whitt, Samuel Mayhorn, Alex. Messer, John Whitt, Elijah Mounts (Beech Creek).

Murder.

Bench warrant awarded.

Pike Circuit Court.

Commonwealth of Kentucky to any sheriff, constable, justice, coroner, marshal, or policeman of the Commonwealth of Kentucky:

You are hereby commanded forthwith to arrest Anderson Hatfield, Johnson Hatfield, Cap. Hatfield, Valentine Hatfield, Elias Hatfield, C. Carpenter, Joseph Murphy, Doc. Mayhorn, Plyant Mayhorn,

Selkirk McCoy, Albert McCoy (Kirk's son), L. D. McCoy, (Kirk's son), Thomas Chambers, Lark Varney, Andy Varney, Daniel Whitt, Samuel Mayhorn, Alex. Messer, John Whitt, and Elijah Mounts and bring them before the Pike circuit court to answer an indictment in that court against them for murder; or, if the court be adjourned for that term, that you deliver them to the jailer of Pike county.

Given under my hand, as clerk of said court, this 18th day of Sept., 1882.

R. M. FERRELL, *Clerk*.

46 Not found in this county Feb'y the 19th, 1883.

J. M. FERGUSON, *S. P. C.*

Pike Circuit Court. M'ch Term, 1883.

COM'LTH *vs.* ANDERSON HATFIELD & Others.

Murder.

Alias bench warrant & continued.

Pike Circuit Court.

Commonwealth of Kentucky to any sheriff, constable, coroner, justice, marshal, or policeman of the Commonwealth of Kentucky:

You are hereby commanded forthwith to arrest Anderson Hatfield, Johnson Hatfield, Cap. Hatfield, Valentine Hatfield, Elias Hatfield, C. Carpenter, Joseph Murphy, Doc. Mayhorn, Plyant Mayhorn, Selkirk McCoy, Albert McCoy (Kirk's son), L. D. McCoy (Kirk's son), Thomas Chambers, Lark Varney, Andy Varney, Daniel Whitt, Samuel Mayhorn, Alex. Messer, John Whitt, and Elijah Mounts and bring them before the Pike circuit court to answer an indictment in that court against them for murder; or, if the court be adjourned for that term, that you deliver them to the jailer of Pike county.

Given under my hand, as clerk of said court, this 10th day of April, 1883.

R. M. FERRELL, *Clerk*,
By T. F. RATLIFF, *D. C.*

Not found in Pike county this 27th day of August, 1883.

47 JOE RANNY, *S. P. C.*

Pike Circuit Court. Sept. Term, 1883.

COM'LTH *vs.* ANDERSON HATFIELD & Others.

Murder.

Alias bench warrant & continued.

Pike Circuit Court.

Commonwealth of Kentucky to any sheriff, constable, coroner, justice, marshal, or policeman in this State:

You are hereby commanded forthwith to arrest Anderson Hatfield, Johnson Hatfield, Cap. Hatfield, Valentine Hatfield, Elias Hatfield, C. Carpenter, Joseph Murphy, Doc. Mayhorn, Plyant Mayhorn, Selkirk McCoy, Albert McCoy (Kirk's son), L. D. McCoy (Kirk's son), Thomas Chambers, Lark Varney, Andy Varney, Daniel Whitt, Samuel Mayhorn, Alex. Messer, John Whitt, and Elijah Mounts and bring them before the Pike criminal court to answer an indictment in that court against them for murder; or, if the court be adjourned for that term, that you deliver them to the jailer of Pike county.

Given under my hand, as clerk of said —, this 6th day of Oct., 1883.

R. M. FERRELL,
Clerk P. C. C.

Not found in this county Feb'y the 19th, 1884.
SAM. DANIELS, *S. P. C.*

Pike Criminal Court. M'ch Term, 1884.

48 COM'LTH *vs.* ANDERSON HATFIELD & Others.

Murder.

Alias bench warrant & continued.

Pike Circuit Court.

Commonwealth of Kentucky to any sheriff, constable, coroner, justice, marshal, or policeman of the Commonwealth of Kentucky:

You are hereby commanded forthwith to arrest Anderson Hatfield, Johnson Hatfield, Cap. Hatfield, Valentine Hatfield, Elias Hatfield, C. Carpenter, Joseph Murphy, Doc. Mayhorn, Plyant Mayhorn, Selkirk McCoy, Albert McCoy (Kirk's son), L. D. McCoy (Kirk's son), Thomas Chambers, Lark Varney and Andy Varney (Henry's sons), Daniel Whitt, Samuel Mayhorn, Alex. Messer, John Whitt, and Elijah Mounts and bring them before the Pike criminal court to answer an indictment in that court against them for murder; or, if the court be adjourned for that term, that you deliver them to the jailer of Pike county.

Given under my hand, as clerk of said court, this 22nd day of M'ch, 1884.

R. M. FERRELL, *Clerk*,
By T. F. RATLIFF, *D. C.*

Not found in this county May 1st, 1884.
S. R. DANIELS, *S. P. C.*,
By J. M. FERGUSON, *D. S.*

Pike Criminal Court. May Term, 1884.

49 COM'LTH *vs.* ANDERSON HATFIELD & Others.

Murder.

Alias bench warrant & continued.

Pike Criminal Court.

Commonwealth of Kentucky to any sheriff, constable, coroner, justice, marshal, or policeman in this State:

You are hereby commanded forthwith to arrest Anderson Hatfield, Johnson Hatfield, Cap. Hatfield, Valentine Hatfield, Elias Hatfield, C. Carpenter, Joseph Murphy, Doc. Mayhorn, Plyant Mayhorn, Selkirk McCoy, Albert McCoy (Kirk's son), L. D. McCoy (Kirk's son), Thomas Chambers, Lark Varney, Andy Varney, Daniel Whitt, Samuel Mayhorn, Alex. Messer, John Whitt, and Elijah Mounts and bring them before the Pike criminal court to answer an indictment in that court against them for willful murder; or, if the court be adjourned for that term, that you deliver them to the jailer of Pike county.

Given under my hand, as clerk of said court, this the 3rd day of June, 1884.

R. M. FERRELL,
Clerk P. C. C.

Not found in Pike county Aug. 19th, 1884.

W. O. B. RATLIFF, *S. P. C.*,
By S. R. DANIELS, *D. S.*

Pike Criminal Court. Aug. Term, 1884.

COM'LTH *vs.* ANDERSON HATFIELD & Others.

Murder.

50 *Alias* bench warrant & continued.

Pike Criminal Court.

Commonwealth of Kentucky to any sheriff, constable, coroner, justice, marshal, or policeman in this State:

You are hereby commanded forthwith to arrest Anderson Hatfield, Johnson Hatfield, Cap. Hatfield, Valentine Hatfield, Elias Hatfield, C. Carpenter, Joseph Murphy, Doc. Mayhorn, Plyant Mayhorn, Selkirk McCoy, Albert McCoy (Kirk's son), L. D. McCoy (Kirk's son), Thomas Chambers, Lark Varney, Andy Varney, Daniel Whitt, Samuel Mayhorn, Alex. Messer, John Whitt, and Elijah Mounts and bring them before the Pike criminal court to answer an indictment in that court against them for murder; or, if the court be adjourned for that term, that you deliver them to the jailer of Pike county.

Given under my hand, as clerk of said court, this 20th day of Sept., 1884.

R. M. FERRELL,
Clerk P. C. C.

Not found in this county Feb'y 18th, 1885.

W. O. B. RATLIFF, *S. P. C.*,
By S. R. DANIELS, *D. S.*

Pike Criminal Court. Feb'y Term, 1885.

COM'LTH *vs.* ANDERSON HATFIELD & Others.

Murder.

Alias bench warrant & continued.

51 Pike Criminal Court.

Commonwealth of Kentucky to any sheriff, coroner, constable, justice, marshal, or policeman in this State:

You are hereby commanded forthwith to arrest Anderson Hatfield, Johnson Hatfield, Cap. Hatfield, Valentine Hatfield, Elias Hatfield, C. Carpenter, Joseph Murphy, Doc. Mayhorn, Plyant Mayhorn, Selkirk McCoy, Albert McCoy (Kirk's son), L. D. McCoy (Kirk's son), Thomas Chambers, Lark Varney, Andy Varney, Daniel Whitt, Samuel Mayhorn, Alex. Messer, John Whitt, and Elijah Mounts, and bring them before the Pike criminal court to answer an indictment in that court against them for murder; or, if the court be adjourned for that term, that you deliver them to the jailer of Pike county.

Given under my hand, as clerk of said court, this 18th day of March, 1885.

R. M. FERRELL, *Clerk*,
By T. F. RATLIFF, *D. C.*

Not found in Pike county Aug. 24th, 1885.

B. HATFIELD, *S. P. C.*

Pike Criminal Court. Aug. Term, 1885.

COM'LTH *vs.* ANDERSON HATFIELD & Others.

Alias bench warrant & continued.

Pike Criminal Court.

52 Commonwealth of Kentucky to any sheriff, constable, coroner, justice, marshal, or policeman in this State:

You are hereby commanded forthwith to arrest Anderson Hatfield, Johnson Hatfield, Cap. Hatfield, Valentine Hatfield, Elias Hatfield, C. Carpenter, Joseph Murphy, Doc. Mayhorn, Plyant Mayhorn, Selkirk McCoy, Albert McCoy (Kirk's son), L. D. McCoy (Kirk's son), Thomas Chambers, Lark Varney, Andy Varney, Daniel Whitt, and Elijah Mounts and bring them before the Pike criminal court

to answer an indictment in that court against them for murder; or, if the court be adjourned for that term, that you deliver them to the jailer of Pike county.

Given under my hand, as clerk of said court, this 18th day of Sept., 1885.

R. M. FERRELL, *Clerk*,
By T. F. RATLIFF, *D. C.*

Not found in Pike county Feb'y 19th, 1886.
B. HATFIELD, *S. P. C.*

Pike Criminal Court. Feb'y Term, 1886.

COMMONWEALTH *vs.* ANDERSON HATFIELD & Others.

Murder.

Alias bench warrant & continued.

Pike Criminal Court.

53 Commonwealth of Kentucky to any sheriff, constable, coroner, justice, marshal, or policeman of the Commonwealth of Kentucky:

You are hereby commanded forthwith to arrest Anderson Hatfield, Johnson Hatfield, Cap. Hatfield, Valentine Hatfield, Elias Hatfield, C. Carpenter, Joseph Murphy, Doc. Mayhorn, Plyant Mayhorn, Selkirk McCoy, Albert McCoy (Kirk's son), L. D. McCoy (Kirk's son), Thomas Chambers, Lark Varney (Henderson'- son), Andy Varney (Henderson'- son), Daniel Whitt, Samuel Mayhorn, Alex. Messer, John Whitt, and Elijah Mounts (Beech Creek) and bring them before the Pike criminal court to answer an indictment in that court against them for murder; or, if the court be adjourned for that term, that you deliver them to the jailer of Pike county.

Given under my hand, as clerk of said court, this 30th day of M'ch, 1886.

R. M. FERRELL, *Clerk*,
By T. F. RATLIFF, *D. C.*

The def'ts not found in Pike county this Aug. the 23rd, 1886.
B. HATFIELD, *S. P. C.*

Pike Criminal Court. Aug. Term, 1886.

COMMONWEALTH *vs.* ANDERSON HATFIELD & Others.

Murder.

Alias bench warrant & continued.

Pike Criminal Court.

54 Commonwealth of Kentucky to any sheriff, constable, coroner, justice, marshal, or policeman of the Commonwealth of Kentucky:

You are hereby commanded forthwith to arrest Anderson Hat-

field, Johnson Hatfield, Cap. Hatfield, Valentine Hatfield, Elias Hatfield, C. Carpenter, Joseph Murphy, Doc. Mayhorn, Plyant Mayhorn, Selkirk McCoy, Albert McCoy, L. D. McCoy, Thomas Chambers, Lark Varney, Andy Varney, Daniel Whitt, Samuel Mayhorn, Alex. Merser, John Whitt, and Elijah Mounts and bring them before the Pike criminal court to answer an indictment in that court against them for murder; or, if the court be adjourned for that term, that you deliver them to the jailer of Pike county.

Given under my hand, as clerk of said court, this 8th day of Nov., 1886.

G. W. PINSON, *Clerk.*

Not found in Pike county.

B. HATFIELD, *S. P. C.*

Pike Criminal Court. Feb'y Term, 1887.

COMMONWEALTH *vs.* ANDERSON HATFIELD & Others.

Murder.

Alias bench warrant & continued.

Pike Criminal Court.

The Commonwealth of Kentucky to any sheriff, constable, coroner, justice, marshal, or policeman of the Commonwealth of Kentucky:

55 You are hereby commanded forthwith to arrest Anderson Hatfield, Johnson Hatfield, Cap. Hatfield, Valentine Hatfield, Elias Hatfield, C. Carpenter, Joseph Murphy, Doc. Mayhorn, Plyant Mayhorn, Selkirk McCoy, Albert McCoy (Kirk's son), L. D. McCoy (Kirk's son), Thomas Chambers, Lark Varney (Henderson'- son), Andy Varney (Henderson'- son), Daniel Whitt, Samuel Mayhorn, Alex. Messer, John Whitt, and Elijah Mounts (Beech Creek) and bring them before the Pike criminal court to answer an indictment in that court against them for murder; or, if the court be adjourned for that term, that you deliver them to the jailer of Pike county this 5th day of May, 1887.

G. W. PINSON, *Clerk.*

Not found in Pike county this Aug. 22nd, 1887.

B. HATFIELD, *S. P. C.*,
By F. PHILIPS, *D. C.*

Pike Criminal Court. Feb'y Term, 1887.

COMMONWEALTH *vs.* ANDERSON HATFIELD & Others.

Murder.

Alias bench warrant & continued.

Pike Criminal Court.

The Commonwealth of Kentucky to any sheriff, constable, coroner, justice, marshal or policeman of the Commonwealth of Kentucky:

56 You are hereby commanded forthwith to arrest Anderson Hatfield, Johnson Hatfield, Cap. Hatfield, Valentine Hatfield, Elias Hatfield, C. Carpenter, Joseph Murphy, Doc. Mayhorn, Plyant Mayhorn, Selkirk McCoy, Albert McCoy (Kirk's son), L. D. McCoy (Kirk's son), Thomas Chambers, Lark Varney (Henderson'- son), Andy Varney (Henderson'- son), Daniel Whitt, Samuel Mayhorn, Alex. Messer. John Whitt, and Elijah Mounts (Beech Creek) and bring them before the Pike criminal court to answer an indictment in that court against them for murder; or, if the court be adjourned for that term, that you deliver them to the jailer of Pike county.

Given under my hand, as clerk of said court, this 5th of May, 1887.

G. W. PINSON, *Clerk.*

Not found in Pike county this Aug. 22nd, 1887.

B. HATFIELD, *S. P. C.*,
By F. PHILLIPS, *D. S.*

Pike Criminal Court. Aug. Term, 1887.

COMMONWEALTH *vs.* ANDERSON HATFIELD & Others.

Murder.

Alias bench warrant & continued.

Pike Criminal Court.

The Commonwealth of Kentucky to any sheriff, constable, coroner, justice, marshal, or policeman of this State:

57 You are hereby commanded forthwith to arrest Anderson Hatfield, Johnson Hatfield, Cap. Hatfield, Valentine Hatfield, Elias Hatfield, C. Carpenter, Joseph Murphy, Doc. Mayhorn, Plyant Mayhorn, Selkirk McCoy, Albert McCoy (Kirk's son), L. D. McCoy (Kirk's son), Thomas Chambers, Lark Varney (Henderson'- son), Andy Varney (Henderson'- son), Daniel Whitt, Samuel Mayhorn, Alexander Messer, John Whitt, and Elijah Mounts (Beech Creek) and bring them before the Pike criminal court to answer an indictment in that court against them for murder; or, if the court be adjourned for that term, that you deliver them to the jailer of Pike county.

Given under my hand, as clerk of said court, this 12th Dec., 1887.

G. W. PINSON, *Clerk.*

Executed the within B. warrant upon Selkirk McCoy by arresting him and delivering him, together with a copy of this B. warrant, to the jailer of Pike Co. this the 12th day of Dec., 1887.

B. HATFIELD, *S. P. C.*,
By J. S. CLINE, *D. S.*

Pike Criminal Court.

The Commonwealth of Kentucky to any sheriff, constable, coroner, justice, marshal, or policeman of the Commonwealth of Kentucky:

You are hereby commanded forthwith to arrest Anderson
58 Hatfield, Johnson Hatfield, Cap. Hatfield, Valentine Hatfield, Elias Hatfield, C. Carpenter, Joseph Murphy, Doc. Mayhorn, Plyant Mayhorn, Selkirk McCoy, Albert McCoy (Kirk's son), L. D. McCoy (Kirk's son), Thomas Chambers, Lark Varney (Henderson'- son), Andy Varney (Henderson'- son), Daniel Whitt, Samuel Mayhorn, Alexander Merser, John Whitt, and Elijah Mounts (Beech Creek), and bring them before the Pike criminal court to answer an indictment in that court against them for murder; or, if the court be adjourned for that term, that you deliver them to the jailer of Pike county.

Given under my hand, as clerk of said court, this 5th day of Dec., 1887.

G. W. PINSON, *Clerk.*

Executed this warrant on Doc. Mayhorn, Plyant Mayhorn, Sam. Mayhorn, Valentine Hatfield, L. D. McCoy (Kirk's son), and Andy Varney by arresting each of them and delivering each of them, with copies of the bench warrants, to the jailer of Pike Co. Jan'y 12th, 1888.

B. HATFIELD, *S. P. C.*,
By C. T. YOST, *D. S.*

STATE OF KENTUCKY, } *sct:*
County of Pike, }

—, G. W. Pinson, clerk of the circuit and criminal courts of
59 Pike county, in the State of Kentucky, do hereby certify that the foregoing and annexed 22 pages contain a full, true, and complete transcript of the records and proceedings of the said Pike circuit and criminal courts in the case therein named, wherein the Commonwealth of Kentucky is plaintiff and Anderson Hatfield, Johnson Hatfield, Cap. Hatfield, Valentine Hatfield, Elias Hatfield, C. Carpenter, Joseph Murphy, Doc. Mayhorne, Plyant Mayhorne, Selkirk McCoy, Albert McCoy (Kirk's son), L. D. McCoy (Kirk's son), Thomas Chambers, Lark Varney (Henderson'- son), Andy Varney (Henderson'- son), Daniel Whitt, Samuel Mayhorn, Alex. Messer, John Whitt, Elijah Mounts (Beech Creek), defendants, as fully and completely as the same appears to me among the records and proceedings now on file and remaining in my office.

Given under my hand and seal of said Pike circuit and criminal courts this 15th day of Feb'y, 1888.

[L. S.] G. W. PINSON,
Clerk Pike Circuit & Criminal Courts.

STATE OF KENTUCKY, } *sct:*
County of Boyd, }

I, John M. Rice, judge of the criminal court for the 16th judicial district of Kentucky and as such sole judge of the Pike criminal court, one of the courts comprising and embraced within said criminal courts for the 16th judicial district aforesaid, do hereby certify that G. W. Pinson, whose genuine signature appears to the foregoing certificate, is and was at the time of signing same clerk of said Pike criminal court, in the said State, duly elected and qualified, and that all of his official acts as such are entitled to full faith and credit, and that his attestation is in due form of law and by the proper officer.

60

Given under my hand this 15th day of Feb'y, 1888.

JOHN M. RICE,
Judge Criminal Court 16th Judicial District of Kentucky.

STATE OF KENTUCKY, } *sct:*
County of Pike, }

I, G. W. Pinson, clerk of the circuit and criminal courts of Pike county, in the State of Kentucky, do hereby certify that John M. Rice, whose genuine signature appears to the foregoing certificate, is and was at the time of signing same judge of the 16th judicial district of Kentucky and as such sole judge of the said Pike criminal court, one of the courts embraced within and comprising a part of said criminal court for said 16th judicial district of Kentucky, duly elected, commissioned, and qualified; that all of his official acts as such are entitled to full faith and credit, and that his attestation is in due form of law and by the proper officer.

61

Given under my hand and the seal of said circuit and criminal courts this the 15th day of February, 1888.

[L. S.]

G. W. PINSON,
Clerk Pike Circuit & Criminal Courts.

Exhibit "E," above referred to, is as follows:

Pike Circuit Court. Sept. Term, 1882.

At a circuit court commenced and held for Pike county, at the court-house, in the town of Pikeville, on Monday, September the 4th, 1882—present, G. N. Brown, judge—the sheriff returned the names of the following grand jurors, to wit: Jeremiah Osborn, Isaac Robinson, Love Childers, Wm. Thompson, G. M. D. Bevins, Richard Staten, Jacob Blackburn, H. M. Dougherty, James H. Scott, J. D. Maynard, Eph. Moore, John Charles, Wm. A. Justice, George J. Courtney, H. Williamson, and Jack Mullens; and H. Williamson, on his motion, is reli-ved, and the sheriff summoned W. O. B. Ratcliff as grand juror to fill said vacancy, who took the oath as required by law.

Ordered, That W. O. B. Ratcliff be appointed foreman of the grand jury for the present term.

62

The grand jury returned the following indictments, which are ordered to be filed, to wit:

Pike Circuit Court. Sept. Term, 1882.

COMMONWEALTH
vs.
ANDERSON HATFIELD, JOHNSON HATFIELD, CAP. HATFIELD, VALENTINE Hatfield, Elias Hatfield, C. Carpenter, Joseph Murphy, Doc. Mayhorn, Plyant Mayhorn, Selkirk McCoy, Albert McCoy (Kirk's son), L. D. McCoy (Kirk's son), Thos. Chambers, Lark Varney (Henderson'- son), Andy Varney (Henderson'- son), Daniel Whitt, Samuel Mayhorn, Alex. Messer, John Whitt, Elijah Mounts (Beech Creek).

Murder.

Bench warrants awarded.

Indictment.

Pike Circuit Court.

THE COMMONWEALTH OF KENTUCKY
against
ANDERSON HATFIELD, JOHNSON HATFIELD, CAP. HATFIELD, VALENTINE Hatfield, Elias Hatfield, C. Carpenter, Joseph Murphy, Doc. Mayhorn, Plyant Mayhorn, Selkirk McCoy, Albert McCoy
63 (Kirk's son), L. D. McCoy (Kirk's son), Thomas Chambers, Lark Varney (Henderson'- son), Andy Varney (Henderson'- son), Daniel Whitt, Samuel Mayhorn, Alex. Merser, John Whitt, Elijah Mounts (Beech Creek).

The grand jury of Pike county, in the name and by the authority of the Commonwealth of Kentucky, accuse Anderson Hatfield, Johnson Hatfield, Cap. Hatfield, Elias Hatfield, C. Carpenter, Joseph Murphy, Doc. Mayhorn, Plyant Mayhorn, Selkirk McCoy, Albert McCoy, L. D. McCoy, Thomas Chambers, Lark Varney, Andy Varney, Daniel Whitt, Sam'l Mayhorn, Alex. Mercer, John Whitt, and Elijah Mounts of the crime of willful murder.

Continued as follows:

The said defendants, as hereinbefore named, on the 9th day of August, 1882, in the county and circuit aforesaid, did willfully, unlawfully, feloneously, and of their malice aforethought kill, slay, and murder Talbert McCoy by shooting him with a gun or pistol loaded
64 with powder and ball—the precise weapon, whether gun or pistol, is unknown to the grand jurors—and from which shooting he then and there immediately died, and to commit which murder the aforesaid defendants did conspire together; each of the defendants, as hereinbefore named, was present at the commission of said murder and did willfully, feloneously, and of their malice aforethought *did* abet, counsel, and advise in the commission of the said murder of the said Talbert McCoy, as hereinbefore de-

scribed. To commit said murder the aforesaid defendants did conspire together, against the peace and dignity of the Commonwealth of Kentucky.

S. G. KINNER,
Commonwealth Attorney.

A true bill.

W. O. B. RATLIFF, *Foreman.*

Filed Sept. 14th, 1882.

R. M. FERRELL, *C. P. C. C.*

Commonwealth's witnesses:

Jacob Puckett, Mathew Hatfield, Anderson Hatfield (George'-son), Richard Hatfield, James McCoy, Talbert Hatfield, Lewis Farley, Sarah McCoy, Joseph Hatfield, Samuel McCoy, A. M. Hatfield, James Francisco, Andrew T. Fenell, John C. Frances, Samuel Simpkins, Harriett Simpkins, Uriah McCoy (Punis' son), George Sprouse, Floyd Hatfield, Murt Stafford, Scott Allen.

65

S. G. KINNER,
Com'w'lth Att'y.

Bench warrant issued Sept. 18th, 1882.

The grand jury reported the following indictments, which *is* ordered to be filed:

Pike Circuit Court. Sept. Term, 1882.

COMMONWEALTH

vs.

ANDERSON HATFIELD, JOHNSON HATFIELD, CAP. HATFIELD, VALENTINE HATFIELD, ELIAS HATFIELD, C. CARPENTER, JOSEPH MURPHY, DOC. MAYHORN, PLYANT MAYHORN, SELKIRK MCCOY, ALBERT MCCOY (KIRK'S SON), L. D. MCCOY (KIRK'S SON), THOMAS CHAMBERS, LARK VARNEY (HENDERSON'-SON), ANDY VARNEY (HENDERSON'-SON), DANIEL WHITT, SAMUEL MAYHORN, ALEXANDER MESSER, JOHN WHITT, ELIJAH MOUNTS (BEECH CREEK).

Murder.

Bench warrant awarded.

Pike Circuit Court.

Commonwealth of Kentucky to any sheriff, constable, coroner, justice, marshal, or policeman of the Commonwealth of Kentucky:

You are hereby commanded forthwith to arrest Anderson Hatfield, Johnson Hatfield, Cap. Hatfield, Valentine Hatfield, Elias Hatfield, C. Carpenter, Joseph Murphy, Doc. Mayhorn, Plyant

66 Mayhorn, Selkirk McCoy, Albert McCoy (Kirk's son), L. D. McCoy (Kirk's son), Thomas Chambers, Lark Varney, Andy Varney, David Whitt, Samuel Mayhorn, Alexander Messer, John Whitt, and Elijah Mounts (Beech Creek) and bring them before the Pike circuit court to answer an indictment in that court against

them for murder; or, if the court be adjourned for that term, that you deliver them to the jailer of Pike county.

Given under my hand, as clerk of said court, this 18th day of Sept., 1882.

R. M. FENELL, *Clerk.*

Not found in this county Feb'y 19th, 1883.

J. M. FERGUSON, *S. P. C.*

Pike Circuit Court. M'ch Term, 1883.

COMMONWEALTH *vs.* ANDERSON HATFIELD & Others.

Alias bench warrant & continued.

Pike Circuit Court.

Commonwealth of Kentucky to any sheriff, constable, coroner, justice, marshal, or policeman of the Commonwealth of Kentucky:

You are hereby commanded forthwith to arrest Anderson Hatfield, Johnson Hatfield, Cap. Hatfield, Valentine Hatfield, Elias Hatfield, C. Carpenter, Joseph Murphy, Daniel Mayhorn, Plyant Mayhorn, Selkirk McCoy, Albert McCoy (Kirk's son), L. D. McCoy
67 (Kirk's son), Thomas Chambers, Lark Varney, Andy Varney, Daniel Whitt, Samuel Mayhorn, Alex. Mercer, John Whitt, and Elijah Mounts (Beech Creek) and bring them before the Pike circuit court to answer an indictment in that court against them for willful murder; or, if the court be adjourned for that term, that you deliver them to the jailer of Pike county.

Given under my hand, as clerk of said court, this 10th day of April, 1883.

R. M. FENELL, *Clerk*,
By T. F. RATLIFF, *D. C.*

Not found in Pike county this 27th day of August, 1883.

JOE RAMEY, *S. P. C.*

Pike Circuit Court. Sept. Term, 1883.

COMMONWEALTH *vs.* ANDERSON HATFIELD & Others.

Murder.

Alias bench warrant & continued.

Pike Circuit Court.

The Commonwealth of Kentucky to any sheriff, constable, coroner, justice, or policeman in this State:

You are hereby commanded forthwith to arrest Anderson Hatfield, Johnson Hatfield, Cap. Hatfield, Valentine Hatfield, Elias Hatfield, C. Carpenter, Joseph Murphy, Doc. Mayhorn, Plyant Mayhorn, Selkirk McCoy, Albert McCoy (Kirk's son), L. D. McCoy
68 (Kirk's son), Thomas Chambers, Lark Varney (H.'s son), Andy Varney (H.'s son), Daniel Whitt, Samuel Mayhorn,

Alex. Merser, John Whitt, and Elijah Mounts (Beech Creek) and bring them before the Pike circuit court to answer an indictment in that court against them for murder; or, if the court be adjourned for that term, that you deliver them to the jailer of Pike county.

Given under my hand, as clerk of said court, the 6th day of Oct., 1883.

R. M. FENELL,
Clerk P. C. C.

Not found in this county Feb'y 19th, 1884.

SAM. DANIELS, *S. P. C.*

Pike Circuit Court. M'ch Term, 1884.

COM'W'LTH *vs.* ANDERSON HATFIELD & Others.

Murder.

Alias bench warrant & continued.

Pike Circuit Court.

Commonwealth of Kentucky to any sheriff, constable, coroner, justice, marshal, or policeman of the Commonwealth of Kentucky:

You are hereby commanded forthwith to arrest Anderson Hatfield, Johnson Hatfield, Cap. Hatfield, Valentine Hatfield, Elias Hatfield, C. Carpenter, Joseph Murphy, Doc. Mayhorn, Plyant Mayhorn, Selkirk McCoy, Albert McCoy (Kirk's son), L. D. McCoy (Kirk's son),
69 Thomas Chambers, Lark Varney and Andy Varney (Henry's sons), Daniel Whitt, Samuel Mayhorn, Alex. Messer, John Whitt, Elijah Mounts (Beech Creek), and bring them before the Pike circuit court to answer an indictment in that court against them for willful murder; or, if the court be adjourned for that term, that you deliver them to the jailer of Pike county.

Given under my hand, as clerk of said court, this 22nd day of M'ch, 1884.

R. M. FENELL, *Clerk*,
By T. F. RATLIFF, *D. C.*

Not found in this county this May 1st, 1884.

S. R. DANIELS, *S. P. C.*,
By J. M. FERGUSON, *D. S.*

Pike Criminal Court. May Term, 1884.

COM'W'LTH *vs.* ANDERSON HATFIELD & Others.

Murder.

Alias bench warrant & continued.

Pike Circuit Court.

The Commonwealth of Kentucky to any sheriff, constable, coroner, justice, marshal, or policeman in this State:

You are hereby commanded forthwith to arrest Anderson Hat-

field, Johnson Hatfield, Cap. Hatfield, Valentine Hatfield, Elias Hatfield, C. Carpenter, Joseph Murphy, Doc. Mayhorn, Plyant Mayhorn, Selkirk McCoy, Albert McCoy (Kirk's son), L. D. McCoy (Kirk's son),
Thomas Chambers, Lark Varney (H.'s son), Andy Varney
70 (H.'s son), Daniel Whitt, Samuel Mayhorn, Alexander Messer,
John Whitt, Elijah Mounts (Beech Creek) and bring them before the Pike criminal court to answer an indictment in that court against them for murder; or, if the court be adjourned for that term, that you deliver them to the jailer of Pike county.

Given under my hand, as clerk of said court, this 3rd day of June, 1884.

R. M. FENELL,
Clerk P. C. C.

Not found in Pike county Aug. 19th, 1884.
W. O. B. RATLIFF, *S. P. C.*,
By S. R. DANIELS, *D. C.*

Pike Criminal Court. Aug. Term, 1884.

COM'W'LTH *vs.* ANDERSON HATFIELD & Others.

Murder.

Alias bench warrant & continued.

Pike Criminal Court.

The Commonwealth of Kentucky to any sheriff, constable, coroner, justice, marshal, or policeman of this State:

You are hereby commanded forthwith to arrest Anderson Hatfield, Johnson Hatfield, Cap. Hatfield, Valentine Hatfield, Elias Hatfield, C. Carpenter, Joseph Murphy, Doc. Mayhorn, Plyant Mayhorn, Selkirk McCoy, Albert McCoy (Kirk's son), L. D. McCoy (Kirk's son), Thomas Chambers, Lark Varney (Henderson'- son), Andy Varney
(Henderson'- son), Daniel Whitt, Sam. Mayhorn, Alexander
71 Messer, John Whitt, Elijah Mounts (Beech Creek) and bring them before the Pike criminal court to answer an indictment in that court against them for murder; or, if the court be adjourned for that term, that you deliver them to the jailer of Pike county.

Given under my hand, as clerk of said court, this 20th day of Sept., 1884.

R. M. FENELL,
Clerk P. C. C.

Not found in this county Feb'y 18th, 1885.
W. O. B. RATLIFF, *S. P. C.*,
By S. R. DANIELS, *D. S.*

Pike Criminal Court. Feb'y Term, 1885.

COMMONWEALTH *vs.* ANDERSON HATFIELD & Others.

Murder.

Alias bench warrant & continued.

Pike Criminal Court.

The Commonwealth of Kentucky to any sheriff, constable, coroner, justice, marshal, or policeman of this State:

You are hereby commanded forthwith to arrest Anderson Hatfield, Johnson Hatfield, Cap. Hatfield, Valentine Hatfield, Elias Hatfield, C. Carpenter, Joseph Murphy, Plyant Mahorn, Selkirk McCoy, Albert McCoy (Kirk's son), L. D. McCoy (Kirk's son), Thomas Chambers, Lark Varney (Henderson'- son), Andy Varney (Henderson'- son), Daniel Whitt, Samuel Mayhorn, Alexan-
72 der Messer, John Whitt, and Elijah Mounts (Beech Creek) and bring them before the Pike criminal court to answer an indictment in that court against them for murder; or, if the court be adjourned for that time, that you deliver them to the jailer of Pike county.

Given under my hand, as clerk of said court, this 18th day of March, 1885.

R. M. FENELL, *Clerk*,
By T. F. RATLIFF, *D. C.*

Not found in Pike county Aug. 24, 1885.

B. HATFIELD, *S. P. C.*

Pike Criminal Court. Aug. Term, 1885.

COM'W'LTH *vs.* ANDERSON HATFIELD & Others.

Murder.

Alias bench warrant & continued.

Pike Criminal Court.

Commonwealth of Kentucky to any sheriff, constable, coroner, justice, marshal, or policeman of this State:

You are hereby commanded forthwith to arrest Anderson Hatfield, Johnson Hatfield, Cap. Hatfield, Valentine Hatfield, Elias Hatfield, C. Carpenter, Joseph Murphy, Doc. Mayhorn, Plyant Mayhorn, Selkirk McCoy, Albert McCoy (Kirk's son), L. D. McCoy (Kirk's son), Thomas Chambers, Lark Varney (Henderson'- son), Andy Varney (Henderson'- son), Daniel Whitt, Samuel Mayhorn, Alexander Messer, John Whitt, Elijah Mounts (Beech Creek)
73 and bring them before the Pike criminal court to answer an indictment in that court against them for murder; or, if the court be adjourned for that time, that you deliver them to the jailer of Pike county.

Given under my hand, as clerk of said court, this 18th day of September, 1885.

R. M. FENELL, *Clerk*,
By T. F. RATLIFF, *D. C.*

Not found in Pike county Feb'y 19th, 1886.
B. HATFIELD, *S. P. C.*

Pike Criminal Court. Feb'y Term, 1886.

COMMONWEALTH *vs.* ANDERSON HATFIELD & Others.

Murder.

Alias bench warrant & continued.

Pike Criminal Court.

Commonwealth of Kentucky to any sheriff, constable, coroner, justice, marshal, or policeman of the Commonwealth of Kentucky:

You are hereby commanded forthwith to arrest Anderson Hatfield, Johnson Hatfield, Cap. Hatfield, Valentine Hatfield, Elias Hatfield, C. Carpenter, Joseph Murphy, Doc. Mayhorn, Plyant Mayhorne, Selkirk McCoy, Albert McCoy (Kirk's son), L. D. McCoy (Kirk's son), Thomas Chambers, Lark Varney (Henderson'- son), Andy Varney (Henderson'- son), Daniel Whitt, Samuel Mayhorn, Alex. Messer, John Whitt, and Elijah Mounts (Beech Creek)
74 and bring them before the Pike criminal court to answer an indictment in that court against them for murder; or, if the court be adjourned for that term, that you deliver them to the jailer of Pike county.

Given under my hand, as clerk of said court, this 30th day of March, 1886.

R. M. FENELL, *Clerk*,
By T. F. RATLIFF, *D. C.*

The def'ts not found in Pike county this Aug. the 23rd, 1886.
B. HATFIELD, *S. P. C.*

Pike Criminal Court. Aug. Term, 1886.

COM'W'LTH *vs.* ANDERSON HATFIELD & Others.

Murder.

Alias bench warrants & continued.

Pike Criminal Court.

Commonwealth of Kentucky to any sheriff, constable, coronor, justice, marshal, or policeman of the Commonwealth of Kentucky:

You are hereby commanded forthwith to arrest Anderson Hatfield, Johnson Hatfield, Cap. Hatfield, Valentine Hatfield, Elias Hatfield, C. Carpenter, Joseph Murphy, Doc. Mayhorn, Plyant Mayhorn, Selkirk McCoy, Albert McCoy (Kirk's son), L. D. McCoy

(Kirk's son), Thomas Chambers, Lark Varney (H.'- son), Andy Varney (H.'- son), Daniel Whitt, Sam. Mayhorn, Alex. Messer, John Whitt, Elijah Mounts (Beech Creek) and bring them before
75 the Pike criminal court to answer an indictment in that court against them for murder; or, if the court be adjourned for that term, that you deliver them to the jailer of Pike county.

Given under my hand, as clerk of said court, this 8th day of Nov., 1886.

G. W. PINSON, *Clerk.*

Not found in Pike county.

B. HATFIELD, *S. P. C.*

Pike Criminal Court. Feb'y Term, 1887.

COM'W'LTH *vs.* ANDERSON HATFIELD & Others.

Murder.

Alias bench warrant & continued.

Pike Criminal Court.

The Commonwealth of Kentucky to any sheriff, constable, coroner, justice, marshal, or policeman of the Commonwealth of Kentucky:

You are hereby commanded to arrest Anderson Hatfield, Johnson Hatfield, Cap. Hatfield, Valentine Hatfield, Elias Hatfield, C. Carpenter, Joseph Murphy, Doc. Mayhorn, Plyant Mayhorn, Selkirk McCoy, Albert McCoy (Kirk's son), L. D. McCoy (Kirk's son), Thomas Chambers, Lark Varney (H.'s son), Andy Varney (H.'s son) Daniel Whitt, Samuel Mayhorn, Alex. Messer, John Whitt, and Elijah Mounts (Beech Creek) and bring them before the Pike criminal court to answer an indictment in that court against them for murder; or, if the court be adjourned for that term, that you deliver
76 them to the jailer of Pike county.

Given under my hand, as clerk of said court, this 5th day of May, 1887.

G. W. PINSON, *Clerk.*

Not found in Pike Co. this Aug. 22nd, 1887.

B. HATFIELD, *S. P. C.*

Pike Criminal Court. Aug. Term, 1887.

COM'W'LTH *vs.* ANDERSON HATFIELD & Others.

Murder.

Alias bench warrant & continued.

Pike Criminal Court.

The Commonwealth of Kentucky to any sheriff, constable, coroner, justice, marshal, or policeman of the Commonwealth of Kentucky:

You are hereby commanded forthwith to arrest Anderson Hat-

field, Johnson Hatfield, Cap. Hatfield, Valentine Hatfield, Elias Hatfield, C. Carpenter, Joseph Murphy, Doc. Mayhorn, Plyant Mayhorn, Selkirk McCoy, Albert McCoy (Kirk's son), L. D. McCoy (Kirk's son), Thomas Chambers, Lark Varney (Henderson'- son), Andy Varney (Henderson'- son), Daniel Whitt, Samuel Mayhorn, Alexander Messer, John Whitt, and Elijah Mounts (Beech Creek) and bring them before the Pike criminal court to answer an indictment in that court against them for murder; or, if the court be adjourned for that term, that you deliver them to the jailer of Pike county.

Given under my hand, as clerk of said court, this 12th day of December, 1887.

77 G. W. PINSON, *Clerk.*

Executed the within warrant upon Selkirk McCoy by arresting him and delivering him, together with a copy of this B. warrant, to the jailer of Pike county this 12th Dec., 1887.

B. HATFIELD, *S. P. C.*,
By J. S. CLINE, *D. S.*

Pike Criminal Court.

The Commonwealth of Kentucky to any sheriff, constable, coroner, justice, marshal, or policeman of the Commonwealth of Kentucky:

You are hereby commanded forthwith to arrest Anderson Hatfield, Johnson Hatfield, Cap. Hatfield, Valentine Hatfield, Elias Hatfield, C. Carpenter, Joseph Murphy, Doc. Mayhorn, Plyant Mayhorn, Selkirk McCoy, Albert McCoy (Kirk's son), L. D. McCoy (Kirk's son), Thomas Chambers, Lark Varney (Henderson'- son), Andy Varney (Henderson'- son), Daniel Whitt, Samuel Mayhorn, Alex. Messer, John Whitt, and Elijah Mounts (Beech Creek) and bring them before the Pike criminal court to answer an indictment against them for murder; or, if the court be adjourned for that term, that you deliver them to the jailer of Pike county.

Given under my hand, as clerk of said court, this 5th day of December, 1887.

G. W. PINSON, *Clerk.*

78 Executed this warrant on Doc. Mayhorn, Plyant Mayhorn, Sam. Mayhorn, Valentine Hatfield, L. D. McCoy (Kirk's son), and Andy Varney by arresting each of them and delivering them, together with copies of the bench warrant, to the jailer of Pike Co., Jan'y 12th, 1888.

B. HATFIELD, *S. P. C.*,
By C. T. YOST, *D. S.*

Executed this warrant by arresting Thomas Chambers and delivering him, together with a copy of this bench warrant, to the jailer of Pike Co., Dec. 5th, 1887.

B. HATFIELD, *S. P. C.*,
By C. T. YOST, *D. S.*

STATE OF KENTUCKY, } sct:
County of Pike, }

I, G. W. Pinson, clerk of the circuit and criminal courts of Pike county, in the State of Kentucky, do hereby certify that the foregoing and annexed 20 pages contain a full, true, and complete transcript of the records and proceedings of the said Pike circuit and criminal courts in the case therein named, wherein the Commonwealth of Kentucky is plaintiff and Anderson Hatfield, Johnson Hatfield, Cap. Hatfield, Valentine Hatfield, Elias Hatfield, C. Carpenter, Joseph Murphy, Doc. Mayhorn, Plyant Mayhorn, Selkirk McCoy, Albert McCoy (Kirk's son), L. D. McCoy (Kirk's son),
79 Thomas Chambers, Lark Varney (Henderson'- son), Andy Varney (Henderson'- son), Daniel Whitt, Samuel Mayhorn, Alex. Messer, John Whitt, Elijah Mounts (Beech Creek), defendants, as fully and completely as the same appears to me among the records and proceedings now on file and remaining in my office.

Given under my hand and seal of said Pike circuit and criminal courts this 15th day of February, 1888.

[L. S.] G. W. PINSON,
Clerk Pike Circuit & Criminal Courts.

STATE OF KENTUCKY, } sct:
County of Boyd, }

I, John M. Rice, judge of the criminal court for the 16th judicial district of the State of Kentucky and, as such, sole judge of the Pike criminal court, one of the courts comprising and embraced within said criminal court for the 16th judicial district aforesaid, do hereby certify that G. W. Pinson, whose genuine signature appears to the foregoing certificate, is and was, at the time of signing same, clerk of said Pike criminal court, in said State, duly elected and qualified, and that all of his official acts as such are entitled to full faith and credit, and that his attestation is in due form of law and by the proper officer.

80 Given under my hand this the 5th day of Feb'y, 1888.

JOHN M. RICE,
Judge Criminal Court, 16th Judicial District of Kentucky.

STATE OF KENTUCKY, } sct:
County of Pike, }

I, G. W. Pinson, clerk of the circuit and criminal courts for Pike county and the State of Kentucky, do hereby certify that John M. Rice, whose genuine signature appears to the foregoing certificate, is and was, at the time of signing same, judge of the criminal court for the 16th judicial district of Kentucky and, as such, sole judge of the said Pike criminal court, one of the courts embraced within and comprising a part of said criminal courts for said 16th judicial district of Kentucky, duly elected, commissioned, and qualified, and that all of his official acts as such are entitled to full faith and credit, and that his attestation is in due form of law and by the proper officer.

Given under my hand and the seal of the said Pike circuit and criminal courts this 15th day of February, 1888.

G. W. PINSON,
Clerk Pike Circuit & Criminal Courts.

81 The response of the relator to the return to the respondent above referred to is as follows:

In the United States District Court for the District of Kentucky.

Plyant Mahon, being first duly sworn, on oath says that it is not true, as alleged in the return made by P. S. Cline, deputy jailer of Pike county, in the State of Kentucky, to the writ of *habeas corpus* heretofore issued by the judge of said court for affiant and against said jailer upon the petition of affiant, that affiant was arrested by the sheriff of said Pike county on the 12th day of January, 1888, under and by virtue of the writs, copies of which are made parts of said return; and it is not true that affiant is in the custody and confinement in the jail of said Pike county by the jailer thereof by virtue of the process aforesaid, but, on the contrary, affiant states the following to be facts with respect to his arrest and confinement aforesaid: That on the 10th day of September, 1887, his excellency S. B. Buckner, Governor of the State of Kentucky, made a requisition upon his excellency E. W. Wilson, Governor of the State of West Virginia, for the surrender of your petitioner to answer a charge said to have been made against him in the county of Pike,
82 in the State of Kentucky, for a murder alleged to have been committed therein some time in the year 1882, and alleged that your petitioner was a fugitive from the justice of said State of Kentucky.

That the said keeper of said jail of said county prepared and one Frank Phillip made the affidavit required by law to accompany said requisition, and he, the said Frank Phillips, was made and designated by his excellency the Governor of Kentucky aforesaid the agent of said State to receive your petitioner from the State of West Virginia; that said requisition was delivered to his excellency the said Governor of West Virginia on the — day of September, 1887, and he directed the issuance of his warrant for your petitioner as therein demanded.

This fact was officially communicated to the said Frank Phillips, agent as aforesaid, on the 21st of November, 1887. Thereupon the said Phillips in his capacity as agent aforesaid, to wit, on the 13th day of December, 1887, declined to take the warrant aforesaid for the arrest and delivery of your petitioner to the authorities of Pike county, Kentucky, by reason of which said warrant was not issued, all of which facts were well known to the said Cline, the
83 keeper of the jail of said Pike county, and all the other officers of said county. Nevertheless, on the 9th day of January, 1888, the said Frank Phillips, in charge of and commanding an armed body of men (about thirty in number), all citizens and residents of the State of Kentucky, with the knowledge of the said keeper

of said jail of Pike county, invaded the State of West Virginia, and without a warrant or any other process of law whatever, by force and arms, arrested affiant, but when asked by what authority he was arrested he, the said Phillips, claimed to your affiant that he was the agent of the State of Kentucky and had authority from the Governor of West Virginia to make said arrest. Being unable to resist, affiant was conveyed, by force and arms as aforesaid, by the said Phillips and his said band of armed men out the State of West Virginia and to the jail of said Pike county, where he was confined by the said keeper of said jail.

That afterwards, to wit, on the 12th day of January, 1888, and while affiant was so confined, a warrant of arrest was served upon him by one Charles Yost.

Affiant further represents that his said arrest and confinement was not made and being secured to have him answer to said charge of murder alleged to have been preferred against him as
84 aforesaid and to serve the ends of public justice, but, on the contrary, your petitioner alleges that it is in pursuance of a combination and conspiracy between the said Phillips and the said Cline to extort money from your affiant; that his excellency E. W. Wilson, Governor of the State of West Virginia, being informed of affiant's illegal arrest and confinement aforesaid, on behalf of the State of West Virginia, on the 1st day of February, 1888, for the reasons hereinbefore stated, made his requisition upon his excellency S. B. Buckner, Governor of the State of Kentucky, demanding that affiant be released from said confinement, set at large, conveyed and returned in safety to the State of West Virginia; that said requisition was presented to his excellency the said Governor of Kentucky, and on the 4th day of January, 1888, said demand was by him refused. Affiant further avers that he is not guilty of any homicide or other felony or of any crime or misdemeanor in said Pike county, in the State of Kentucky; that he is entirely innocent of any charge or pretended charge that the said Frank Phillips, the said jailer, or other authority of the said county of Pike have
85 made or may make against him. Affiant says that his said arrest and confinement is illegal and in violation of the Constitution and laws of the United States, in violation of his right as a citizen of the State of West Virginia—*i. e.*, as guaranteed him by the Constitution of the United States—and in violation of the laws of the State of Kentucky.

Wherefore affiant prays that judgment be made, entered, and executed by this honorable court, discharging and releasing him from said confinement and custody and safely returning him to and within the jurisdiction of the State of West Virginia.

STATE OF ——,
County of ——, } *sct:*

Taken, signed, and sworn to before me, —— ——, a notary public for said county, by —— ——, whose name is signed to the foregoing petition, this the — day of February, 1888.

—— ——.

And on another day of said term of said court, to wit, on Monday, February 27th, 1888, came again the respondent. The relator was brought to the bar of the court in custody of the marshal.

This court having heretofore ordered, upon the petition of John A. Sheppard, a *habeas corpus* to issue commanding the jailer
86 of Pike county, Kentucky, to produce the body of Plyant Mahon with the cause of his detention, and said order having been subsequently amended so as to require said jailer to deliver the custody of said Mahon to the marshal of this district, and said Mahon having been brought into court under said writ and order, and said jailer having made his return stating the cause of the detention of said Mahon, it is now ordered, upon the motion of the counsel representing said Sheppard and Mahon, that said Mahon have leave to respond to said return and that the hearing and all subsequent proceedings under said writ of *habeas corpus* shall be in the name and under the style of Plyant Mahon.

Came the respondent, by his attorneys, and filed his amended return herein without objection on the part of the relator. Thereupon the relator, by his attorneys, moved the court for leave to withdraw his affidavit filed on the 25th instant, to which the respondents object, and the court being advised overrules said objection and sustains said motion to withdraw said affidavit, but the same shall not be withdrawn from the files of the case. Came again the relator, by his attorneys, and filed his response to the return and amended return of Abner Justice, jailer of Pike county, herein.

87 The amended return above referred to is as follows:

In the District Court of the United States for the District of Kentucky.

In re PLYANT MAHON.

On *habeas corpus*.

Now, at this —, comes Abner Justice, jailer of Pike county, in the State of Kentucky, and, by leave of the court, amends his return to the writ of *habeas corpus* herein commanding him to produce the body of Plyant Mahon and the cause of his detention by him as jailer as aforesaid here in court; and in addition to the facts stated in said return, which are reaffirmed and certified as true, now says and certifies to the court here that on the 10th day of September, 1887, his excellency S. B. Buckner, Governor of the State of Kentucky, made upon his excellency E. W. Wilson, Governor of the State of West Virginia, a requisition in writing, under the great seal of the Commonwealth, as the manner is demanding of him, the said Governor of West Virginia, the arrest and rendition of him, the said Plyant Mahon, to the said State of Kentucky to answer to an indictment pending against him, the said Plyant Mahon, in the criminal court of Pike county, in said State, for the crime of willful murder alleged to have been committed by him, the said Mahon, in said

county, he, the said Mahon, being a fugitive from the justice
88 of said State, and, as was alleged, taking refuge in the said State of West Virginia, which said requisition was accompanied by a copy of the indictment therein referred to, which was certified by the said Governor of Kentucky to be authentic, and at the same time appointed one Frank Phillips as the agent of the said State of Kentucky to receive and bring to the said State of Kentucky the said Plyant Mahon, as provided by law in such cases; that thereafter the said Governor of the State of West Virginia, to wit, on the 30th day of September, 1887, returned the said requisition to the said Governor of the State of Kentucky informing him that an affidavit, as required by the statutes of the State of West Virginia, should accompany said requisition before the same could be complied with; that thereafter the said Governor of Kentucky, to wit, on the 13th day of October, 1887, returned the said requisition to the said Governor of West Virginia accompanied by the affidavit required; that thereafter, to wit, on or about the 12th of January, 1888, Frank Phillips and others, with force and arms, violently seized him, the said Plyant Mahon, in the State of West Virginia, and brought him, against his will, into the county of Pike, in the State of Kentucky, where the three writs mentioned in
89 the said jailer's return, to which this is an amendment, copies of which are filed therewith as parts thereof, marked, respectively, 1, 2, & 3, were executed upon him by the sheriff of said Pike county, as herein stated; that at that time no warrant for the arrest of said Plyant Mahon had been issued or ordered to be issued and never had been issued or ordered to be issued by the said Governor of the State of West Virginia in compliance with said requisition, but that thereafter the said Governor of West Virginia informed the said Governor of Kentucky, by letter dated January 30th, 1888, that he, the said Governor of West Virginia, had declined to issue his warrant for the arrest of said Plyant Mahon, in compliance with the requisition made upon him, because, as he alleged, he had become satisfied, upon an investigation of the facts, that said Mahon was not guilty of the crime as charged against him in said indictment, and that thereafter, to wit, on the 1st day of February, 1888, said Governor of West Virginia made upon the said Governor of Kentucky a demand in writing, under the great seal of the State of West Virginia, for the release of said Mahon from the jail of said county of Pike and his safe conduct back into the said State of West Virginia, and that the said
90 Governor of the State of Kentucky declined to comply therewith, upon the ground that said Mahon was in the custody and under the control of the judicial department of the Commonwealth, and that the question of the release of said Mahon upon the grounds alleged in the demand was one which the courts alone could determine, and that the adjudication thereof was not within the perview of his powers and duties as Governor; all of which was respectfully communicated by him to the said Governor of West Virginia in writing. He further says and certifies that he, the said jailer of Pike county, took no part whatever in the capture of said

Mahon, in the State of West Virginia, by Frank Phillips and those who were with him; that he was not present when it was done and neither advised, aided, abetted, requested, a-thorized, or commanded the said Phillips and those who *was* with him to make said capture, and that said Frank Phillips and those who aided him captured said Mahon in the State of West Virginia and brought him against his will into the State of Kentucky of their own wrong and without any warrant, authority, order, or command of the State of Kentucky, and without the knowledge, consent, aid, assistance, advice,
91 counsel, or command of him, the said jailer.

Given under my hand this 27th day of February, 1888.

ABNER JUSTICE,
Jailer of Pike County, Kentucky,
By P. S. CLINE,
Deputy Jailer of Pike County, Ky.

The affidavit of the relator to the return and amended return of the respondent above referred to is as follows:

In the United States District Court for the District of Kentucky.

Your petitioner, Plyant Mahon, says that it is not true, as alleged in the return made by P. S. Cline, deputy jailer for Abner Justice, jailer of Pike county, in the State of Kentucky, to the writ of *habeas corpus* heretofore issued by the judge of said court for your petitioner and against said jailer upon the petition heretofore filed by your petitioner in said court, your petitioner was arrested by the sheriff of said Pike county on the 12th day of January, 1888, and by virtue of the writs, copies of which are filed with and as part of the original return filed as aforesaid; and it is not true that your petitioner is in the custody
92 and confined in the jail of Pike county by the jailer thereof by virtue of the processes aforesaid, but, on the contrary, your petitioner states the following to be the facts with respect to his arrest and confinement aforesaid: That on the 10th day of September, 1887, his excellency S. B. Buckner, Governor of the State of Kentucky, made a requisition upon his excellency E. W. Wilson, Governor of the State of West Virginia, for the surrender of your petitioner to answer a charge said to have been made against your petitioner in the county of Pike, in the State of Kentucky, for a murder alleged to have been committed therein some time in the year 1882, and alleging that your petitioner was a fugitive from the justice of said State; that one Frank Phillips was made and designated by his excellency the Governor of Kentucky aforesaid the agent of the State of Kentucky to receive your petitioner from the State of West Virginia, and that said Phillips made the affidavit required by statute law of the State of West Virginia to accompany said requisition; that said requisition was delivered to his excellency the Governor of West Virginia on the — day of September, 1887; that, pending the consideration of said requisition by his excellency the Governor of the State of West Virginia and the correspondence
93 between him and his excellency the Governor of the State of Kentucky concerning said requisition, on the 9th day of Jan-

uary, 1888, the said Frank Phillips, in charge of and commanding an armed body of men (about thirty in number), all citizens and residents of the State of Kentucky, with the knowledge of the said keeper of said Pike county jail, invaded the State of West Virginia, and, without a warrant from the Governor of the State of West Virginia, he not having issued his warrant upon said requisition at any time or any other process of law whatever, by force and arms, arrested your petitioner, but when asked by what authority he was so arrested he, the said Phillips, claimed to your petitioner that he was the agent of the State of Kentucky under said requisition, and had authority from the Governor of West Virginia to make said arrest. Being unable to resist, your petitioner was conveyed, by force and arms aforesaid, by the said Phillips and his said band of armed men out of the State of West Virginia and into and in the jail aforesaid, Pike county, where he was confined by the said keeper of the said jail; that afterwards, to wit, on the 12th day of
94 January, 1888, and while your petitioner was so confined, a warrant of arrest was served upon him by one Charles Yost.

Petitioner further says that his excellency E. W. Wilson, Governor of the State of West Virginia, on the 1st day of February, 1888, for the reasons hereinbefore stated, made his requisition upon his excellency S. B. Buckner, Governor of the State of Kentucky, demanding that your petitioner be released from said confinement, set at large, conveyed, and returned in safety to the State of West Virginia; that said requisition was presented to his excellency the said Governor of Kentucky, and on the 4th day of February, 1888, said demand was by him refused.

Your petitioner alleges that his said arrest and confinement was and is illegal and in violation of the Constitution of the United States and the laws made in pursuance thereof, in violation of the constitution of the State of West Virginia and the laws made in pursuance thereof, and in violation of the constitution of the State of Kentucky and the laws made in pursuance thereof.

95 Petitioner further states that the changes made in this affidavit from that heretofore filed by him have been made after further information and investigation, and that each and every allegation in the return and amended return aforesaid contrary or inconsistant with the statements herein contained is true.

Wherefore, since your petitioner is remediless save in a court or judge thereof, in vacation, having proper cognisance of the matter, he prays that judgment be made, entered, and executed discharging and releasing him from said confinement and custody and safely returning him to an- within the jurisdiction of the State of West Virginia; and petitioner will ever pray, &c.

PLYANT MAHORN.

Subscribed and sworn to before me this 27th day of February, 1888.

SAM'L B. CRAIL, *Clerk*,
By HENRY F. CASSIN, *D. C.*

96 And on another day of said term of said court, to wit, on Tuesday, February 28th, A. D. 1888, came again the respondent, by J. Proctor Knott and P. W. Hardin, his counsel. The relator was brought to the bar of the court in custody of the marshal, having Eustace Gibson and J. H. St. Clair for his counsel. The parties, by their counsel, filed their written agreement herein. The evidence and agreements of counsel having been heard, thereupon the relator, by his counsel, Eustace Gibson and J. H. St. Clair, moved the court for judgment of discharge; to which the respondent, by his counsel, J. Proctor Knott and P. W. Hardin, objected.

And the court, not being advised of said motion, takes time. The relator is remanded to the custody of the marshal until the further order of court. Written agreement above referred to is as follows:

It is agreed by the parties that the facts stated in the amended return made by the jailer to the writ in the case of Andrew Varney, in so far as the same may not differ from the original return made by the jailer in this case, shall be taken and considered as an amended return to the writ in this case, and also that the records and the evidence, written and parol, heard and considered in said case shall be taken and considered as heard in this case for the same purposes, and to have the same effect as in that case, this case being by consent of parties heard along with that.

97 And on another day of said term of court, to wit, on Saturday, March 3d, 1888:

This day came the respondent, Abner Justice, by Proctor Knott, Esq., his counsel. The relator, Plyant Mahon, was brought to the bar of the court in custody of the marshal, having Eustace Gibson for his counsel.

The court, now being fully advised of the motion of the relator for judgment of discharge, files a written finding of facts herein. It is therefore considered by the court that said motion be, and the same is hereby, overruled.

The said relator being in the custody of A. J. Gross, United States marshal for this district, the said marshal is authorized — retain him in custody in the city of Louisville until he is delivered to respondent, the jailer of Pike Co., Ky.; and in the meantime the said marshal is authorized to commit him to the jail of Jefferson county for safe keeping.

Thereupon the relator moved the court to set aside the findings and judgment herein, and the court, being advised, overruled said motion; to which ruling and judgment of the court the relator excepts.

And it is further considered by the court that the respondent, Abner Justice, recover of the relator, Plyant Mahon, his costs in and about his defense of said writ herein expended.

Thereupon the relator prays an appeal to the United States circuit court for this circuit, which is granted.

It is ordered that the clerk of this court do furnish a copy of this order to the respondent herein.

Came again the relator and tendered his bill of exceptions herein,

which is signed and sealed by the court and made a part of this record.

On motion of relator it is ordered that the original papers
98 filed herein be transmitted and certified to the circuit court for its inspection.

The finding of facts above referred to is as follows:

In the Matter of PLYANT MAHON.

Abner Justice, jailer of Pike county, having made his return to the writ of *habeas corpus* issued herein on the — day of February, 1888, and Plyant Mahon having filed his response thereto and produced evidence, the court — the following to be the facts as admitted by the parties or proven to the court's satisfaction, namely:

The petitioner Mahon, together with nineteen other persons, were, at the September —, 1882, of the circuit court of Pike county, Ky., indicted by the grand jury empanelled in and by the said court for wilful murder alleged to have been committed by them in said county. Mahon was at the time and had always been and still is a citizen of West Virginia and a resident of Logan county, in said State.

His excellency S. B. Buckner, Governor of the State of Kentucky, on the 10th day of September, 1887, made upon his excellency E. W. Wilson, Governor of the State of West Virginia, a requisition, under the seal of the Commonwealth, demanding of him, the Governor of West Virginia, the arrest and rendition of the said Plyant Mahon and the others in said indictment to the State of Kentucky to answer the same, claiming that the said Mahon and the others had fled as fugitives from justice from said State. Said requisition was accompanid by a copy of the indictment therein referred to, which was certified by the Governor of Kentucky to be authentic, in which requisition he appointed one Frank Phillips agent of the State of Kentucky to receive said Mahon and others and bring them to the State of Kentucky. This requisition was not acted upon by the Governor of West Virginia because, as he stated, of the
99 want of an affidavit, in conformity with the laws of West Virginia.

An affidavit was then made by Frank Phillips in compliance with said request, and on the 13th of October, 1887, was sent by his excellency Governor Buckner to his excellency Governor Wilson. There was no further correspondence between the said Governors in regard to said requisition until the 9th January, 1888. In the meantime the Honorable Henry S. Walker, secretary of state of West Virginia, by letter dated November 21st, 1887, wrote to P. A. Cline, who was deputy jailer of Pike county, in reply to a letter of inquiry from him, and notified him that the said requisition of the Governor of Kentucky would be honored except as to Elias Hatfield and Andy Varney, and that the warrants would be issued for their arrest upon the receipt of $54.00, his fees for issuing the same. The reason given for not issuing warrants for Elias Hatfield and Andrew Varney was because they were not guilty,

in the Governor's opinion, from the evidence which had been presented to him. Subsequently, by letter dated D'c'r 13th, 1887, Frank Phillips, the person appointed as agent as aforesaid, wrote to his excellency Governor Wilson, enclosing $15.00 to pay fees of the secretary of the state and requesting he should issue his warrants for the arrest of Anderson Hatfield, Johnson Hatfield, Cap. Hatfield, Daniel White, and Andy McCoy, and that he send these warrants to him, Phillips, at Pikeville.

In this letter he informed the Governor that he did not care for and did not intend to interrupt said Elias Hatfield and Andy Varney, and if they wanted any of the other persons mentioned in said requisition he would send for the warrants for their arrest.

100 Both Phillips and Cline lived in Pike county, Ky. This money ($15) was returned to Phillips and the order for the warrants countermanded by Governor Wilson because, as he states, from information subsequently obtained, he believed the requisition and expected warrant would be used, not to secure public justice, but to extort money from the accused.

His excellency Governor Buckner, on the 9th January, 1887, wrote to his excellency Governor Wilson a letter of inquiry in regard to his action under the requisition. This letter of inquiry was replied to January 21st, 1888, by Governor Wilson. (See copies of said letters of Walker, secretary of state; Phillips, Governor Buckner, & Governor Wilson, copies of which will be annexed hereto, marked 1, 2, 3, 4.)

No warrants had been issued by the Governor of West Virginia for the arrest of any of the persons mentioned in said requisition on the 9th January or before or since that time.

Frank Phillips, with twenty-five or thirty armed men, went from Kentucky across into West Virginia, and with force and arms arrested the petitioner, Plyant Mahon, Jan'y 9th, 1888, and against his will and by force brought him to the town of Pikeville, in the State of Kentucky, and on January 11th, 1888, placed him in the jail of Pike county, in said town, which was then in charge of Abner Justice, jailer of said county, and on the next day, Jan'y 12th, 1888, while thus confined in said jail, in said town, he was served with a bench warrant and arrested by the deputy sheriff of said county. The bench warrant under which he was arrested was issued from the clerk's office of the criminal court of Pike county, which court then had jurisdiction to issue bench warrants and try the persons charged under the aforesaid indictments. When he was arrested Phillips was asked by Mahon by what authority he did so, and he

101 said that he was State's agent to arrest him and take him to "Pike," and that he was authorized by the Governor of West Virginia to make the arrest.

His excellency Governor Wilson did, under the seal of West Virginia, demand of his excellency Governor Buckner the surrender and return to the State of West Virginia of the said Mahon and the others, who had been seized by force of arms and carried away to Pike county by said Phillips and others; which request was de-

clined by his excellency Governor Buckner on the 4th of February, 1888. See copies of the requisition of Governor Wilson and the reply thereto of Governor Buckner, marked 5 & 6; and I also annex hereto as part of this finding copies of the requisition of Governor Buckner to Governor Wilson, dated September 10th, 1887, marked No. 8, with accompanying affidavit of Frank Phillips.

I further certify that during the hearing of the issue made upon the return of the *habeas corpus* herein the relator offered as evidence telegram from Governor Wilson to Governor Buckner, Jan'y 26th, 1888; letters from Governor Wilson to Governor Buckner, Jan'y 26th, 1888; Governor Wilson to Governor Buckner, Jan'y 30th, 1888, Nos. 9, 10, 11, 12, 13, & 14, respectively; Governor Buckner to Governor Wilson, letter dated Jan'y 30th, 1888, No. 15; Governor Wilson to Governor Buckner, dated Feb'y 13th, 1888, No. 16; affidavits of Pinson, Auxier, & Hatfield, No-. 17, 18, & 19, respectively. Last three affidavits are the same referred to in letter of Governor Wilson to Governor Buckner, dated January 21st, 1888, as set forth in statement of facts.

Letters above referred to, marked 1, 2, 3, & 4, are as follows:

102

STATE OF WEST VIRGINIA,
OFFICE OF SECRETARY OF STATE,
CHARLESTON, *Nov. 21st*, 1887.

P. A. Cline, Esq., Pikeville, Ky.

DEAR SIR: The requisition of his excellency the Governor of Kentucky for Anderson Hatfield and twenty others, jointly, has been honored as to all the parties named except Elias Hatfield and Andrew Varney; these two parties have produced evidence before the Governor that shows beyond question that they were in nowise connected with the murder for which they are indicted along with the others in the said requisition. The warrants for the arrest of the 18 named in the requisition will be issued — receipt of $54.00, the fees, &c., therein due this office.

Yours truly,

HENRY S. WALKER,
Secretary of State.

P'r F.

OFFICE OF PERY A. CLINE, ATTORNEY AND
COUNSELLOR AT LAW, OFFICE BACK OF
COURT-HOUSE, PIKEVILLE, KY., *Dec. 13th*, 1887.

To his excellency Governor Wilson.

DEAR SIR: Inclosed please find 15 dollars to pay fees due your office upon the issue of State warrants for the following-named parti*ys*: War't for Anderson Hatfield, Johnson Hatfield, Cap. Hatfield, Daniel White, Albert McCoy (Kirk's son). Please send warrants to this place to Frank Phillips, the agent appointed by the Governor of Kentucky. As to Elias Hatfield and Andy Varney, we
103 do not care for; did not intend to intercept them. Some of the part*eys is* dead and some gone and left the country. The reason they all *was* named in the requisition was they were

all jointly indicted, and — just copied the indictment; so if we want any others of the parteys we will send for the warrants hereafter.

Yours respectfully, FRANK PHILLIPS.

EXECUTIVE DEPARTMENT,
FRANKFORT, *Jan'y 9th*, 1888.

SIR: On the 10th day of September, 1887, I issued a requisition, addressed to your excellency, requesting the rendition of Anderson Hatfield & others, charged with murder in this State, and on the 30th of the same month you returned said requisition, accompanied by a letter calling attention to the absence of the affidavits required by section 12, chapter 144, Otto, 1882, W. Va.

On the 13th October last I returned to you said requisition, accompanied by the affidavit required by your State, and supposed that the necessary steps had been taken for the arrest of the offenders named, but I have been recently informed that such is not the case. In addition to the crimes for which these parties stood indicted at the time said requisition was issued, they have very recently perpetrated other crimes, of the most atrocious character, in this State, near the scene of their former outrages, and should be brought to justice. Feeling assured that your excellency desires to co-operate in measures necessary to accomplish this end, I am induced to inquire whether the requisition, accompanied by the additional affidavits required by your statutes, has been received and whether there now exists any obstacle to prevent the rendition of the criminals referred to.

104 I have the honor to be your most obedient servant,

L. B. BUCKNER.

To his excellency E. W. Wilson, Governor of West Virginia.

EXECUTIVE DEPARTMENT,
CHARLESTON, *Jan. 21st*, 1888.

SIR: On account of sickness in my family and necessary absence with the board of public works an unavoidable delay has occurred in answering your communication of the 9th inst. Although the indictments of Anderson Hatfield and others were found more than five years before the application to either your excellency or your predecesssor for a requisition and the parties charged were continuously residing in the neighborhood of the alleged crime, and although the application for the requisition does not appear to be made or supported by any official authority of the county, I directed the warrants to issue, as soon as the affidavits required by the State was filed, against all the parties named, excepting Elias Hatfield and Andrew Varney. The many affidavits and statements of reliable persons showing that these two men were miles away from the place at the time of the killing of McCoy induced me to withhold for the present the warrant as to them, believing that when your excellency was made acquainted with the facts their rendition would not be demanded.

After the warrant was directed and prepared, as before mentioned, reliable information was received from various persons (and amongst them F. D. Williams, who was appointed by your excellency in the matter of the requisition for E. & L. Perdees) that the requisition and expected warrant were being used, not to secure the ends of public justice, but to extract money from the accused.

105 I enclose copies of affidavits of G. W. Pinson, clerk of the criminal court of Pike county, Johnson Hatfield, and A. J. Auxier, an attorney of Pike county; also copy of letter of Frank Phillips, which is evidently in the handwriting of Cline, and extracts from a letter of John A. Shepherd, an attorney of Logan Co., this State. I am sure your excellency will conclude with me that neither Cline nor Philips, nor any of the persons engaged in the recent violations of the law, are proper persons to entrust with process of either Kentucky or West Virginia. Considering that no move was made in this for more than five years after the finding of the indictments, although the accused have continued their residence in the same locality during all that time, I would be glad if such enquiry were directed as to your excellency may seem proper, so that warrants may issue for those only against whom there is some evidence of guilt.

Resp't'y & ob'd't'y, E. W. WILSON.

To his excellency S. B. Buckner, Gov. Ky.

The copies of the requisition of Governor Wilson and reply thereto of Governor Buckner, marked 5 & 6, above referred to, are as follows:

THE STATE OF WEST VIRGINIA,
EXECUTIVE DEPARTMENT.

To his excellency the Governor of Kentucky:

Whereas it appears by the petition and affidavits of W. P. Floyd, hereto attached and made part hereof, duly authenticated in accordance with the laws of this State and hereby certified to be so authenticated, that Valentine Hatfield, Thomas Chambers,

106 Andrew Varney, Selkirk McCoy, L. D. McCoy, Moses Christian, Samuel Mahon, D. D. Mahon, and Plyant Mahon, citizens of said State, have within the last past few weeks, without warrant or any legal process whatever, with force and arms, in said State, been seized and carried away therefrom to Pike county, Kentucky, and that each and all of said persons, without authority of law, have ever since been and still are deprived of their liberty and confined in the jail of said Pike county by the sheriff and the keeper of the said jail thereof: Now, therefore, pursuant to the Constitution of the United States, the comity of States, and the law of the land, I, E. W. Wilson, Governor of the State of West Virginia, do hereby request that the said Valentine Hatfield, Thomas Chambers, Andrew Varney, Selkirk McCoy, L. D. McCoy, Moses Christian, Samuel Mahon, D. D. Mahon, and Plyant Mahon be released from said confinement,

set at large, and conveyed and returned in safety to the State of West Virginia.

In witness whereof I have hereunto affixed my name and the great seal of the State of West Virginia, at the city of Charleston, this first day of February, in the year of our Lord 1888, and of the State the twenty-fifth.

E. W. WILSON.

By the Governor:
HENRY S. WALKER,
Secretary of State.

107 To his excellency E. W. Wilson, Governor of West Virginia:

Your petitioner, W. P. Floyd, being first duly sworn, deposes and says that he is a citizen of the State of West Virginia; that to the best of his knowledge and belief, within the last past few weeks, Frank Phillips and others, citizens of the State of Kentucky, without warrant or any legal process whatever, with force and arms, in the State of West Virginia, seized and carried away therefrom to Pike county, Kentucky, the following-named citizens of the State of West Virginia, to wit, Valentine Hatfield, Thomas Chambers, Andrew Varney, Selkirk McCoy, L. D. McCoy, Moses Christian, Samuel Mahon, D. D. Mahon, and Plyant Mahon; that each and all of said persons so seized and carried away to Pike county, Kentucky, aforesaid, have since been and still are, without authority of law, deprived of their liberty and confined in the jail of said Pike county by the sheriff and keeper of the jail thereof.

Your petitioner therefore, in behalf of each and all of said persons so seized and carried away, confined, and deprived of their liberty, and for the vindication of the outraged law of the State of West Virginia, prays your excellency will demand of the Governor of Kentucky the immediate rendition and return to the State of West Virginia of each and all of said persons, to wit, Valentine Hatfield, Thomas Chambers, Andrew Varney, Selkirk McCoy, L. D. McCoy, Moses Christian, Samuel Mahon, D. D. Mahon, and Plyant Mahon.

W. P. FLOYD, *Petitioner.*

Taken, subscribed, and sworn to before me by W. P. Floyd
108 this first day of February, 1888, in Kanawha county, West Virginia.

JOHN B. FLOYD,
Notary Public in and for Kanawha County, West Virginia.

I hereby certify that the words "every since," interlined in the thirteenth line from the bottom, and the words "without authority of law," interlined in the twelfth line from the bottom of the first page *page* of the foregoing petition and affidavits, were so interlined

before the taking, signing, and swearing *of* the said petitioner by said W. P. Floyd.

JOHN B. FLOYD,
Notary Public in and for Kanawha County, West Virginia.

OFFICE SECRETARY OF STATE.

I, Henry S. Walker, secretary of state of the State of West Virginia, do hereby certify that John B. Floyd, whose name is signed to the annexed certificate, bearing date on the first day of February, 1888, was, at the date thereof, a notary public in and for the county of Kanawha, this State, duly commissioned and qualified, and that full faith and credit are due to all his acts as such; all of which appears of record in this.

Given under my hand and the great seal of the said State, at the city of Charleston, this first day of February, 1888.

[SEAL.] HENRY S. WALKER,
Secretary of State.

STATE OF WEST VIRGINIA, } *To wit:*
Kanawha County, }

109 W. L. Mahon, being by me first duly sworn, on oath says that on the 2d day of February, 1888, he presented the original, of which the within requisition is a copy, to his excellency S. B. Buckner, Governor of the State of Kentucky, and on the 4th day of February, 1888, received from him, to be delivered to his excellency E. W. Wilson, Governor of West Virginia, the communication of the last-mentioned date, attached to said copy and marked "Exhibit A," and that affiant delivered said communication to his excellency E. W. Wilson on the 5th day of February, 1888.

W. L. MAHON.

Taken, subscribed, and sworn to before me, in Kanawha county, W. Va., this 6th day of Feb'y, 1888.

[SEAL.] JOHN B. FLOYD,
Notary Public in and for Kanawha County, W. Va.

EXECUTIVE DEPARTMENT,
FRANKFORT, *Feb'y 4th*, 1888.

SIR: I have the honor to acknowledge the receipt of a requisition from your excellency, dated Feb'y 1, 1888, and addressed to the Governor of Kentucky, requesting the release of Valentine Hatfield and others, who, it is alleged, have been recently seized in West Virginia without warrant or process of law and carried to Pike county, Kentucky, where, it is further alleged, they are now confined in the jail of said county without authority of law. I understand that all the persons named in said requisition stand indicted in the Pike circuit court for murder, and that they are now held by the
110 jailer of said county to answer said charge. I am therefore aware of no law which would authorize me to order their release or which would make it the duty of the jailer of said county to obey such an order, even if I should consent to do so. The law

of the State imposes severe penalties upon a jailer or other officer who shall imprison any person without due process of law, and hence, whatever means may have been employed to bring the persons named from West Virginia to this State, I assume that they were delivered to the jailer of Pike county under and in pursuance of some legal process which makes it the duty of said officer to detain them; but be this as it may, the circumstances under which the persons named were committed and are now held by that officer, and all questions of fact and of law, which is not the provi-ce of the executive of this State to decide, but which can alone be rightfully determined by the judicial authorities of this State, who, upon the proper application, would, I feel assured, promptly discharge them from custody if, as alleged, they are confined without authority of law. Under these circumstances your excellency can readily see that it would not be proper for me to attempt to interfere in any way with the administration of justice by one of the co-ordinate branches of the State government.

I have the honor to be, very respectfully, your ob't se'v't,

S. B. BUCKNER.

His excellency E. W. Wilson, Governor of West Virginia.

Copies of the requisition of Governor Buckner to Governor
111 Wilson, dated Sept. 10th, 1887, marked No. 8, with accompanying affidavits of Frank Phillips, are as follows:

In the name and by the authority of the Commonwealth of Kentucky, S. B. Buckner, Governor of said Commonwealth, to all to whom these presents shall come, Greeting:

To his excellency Governor of the State of West Virginia:

Whereas Anderson Hatfield, Johnson Hatfield, Cap. Hatfield, Valentine Hatfield, Elias Hatfield, C. Carpenter, James Murphy, Doc. Mahon, Plyant Mahon, Silkirk McCoy, Albert McCoy, L. D. McCoy, Thomas Chambers, Lark Varney, Andy Varney, Daniel White, Sam'l Mahon, Alexander Messer, John White, and Elijah Mounts stand charged by indictments with the crime of murder, committed in the county of Pike, and information has been received at the executive department of this State that the said Anderson Hatfield, Johnson Hatfield, Cap. Hatfield, Valentine Hatfield, Elias Hatfield, C. Carpenter, James Murphy, Doc. Mahorn, Plyant Mahorn, Silkirk McCoy, Albert McCoy, L. D. McCoy, Thomas Chambers, Lark Varney, Andy Varney, Daniel Whitt, Sam'l Mahorn, Alexander Messer, John Whitt, and Elijah Mounts have fled from justice and are now going at large in the State of West Virginia, and it being important and highly necessary for the good of society that the perpetrators of such offenses should be brought to justice: Now, therefore, I, S. B. Buckner, Governor of the Commonwealth of Kentucky, by virtue
of the authority vested in me by the Constitution and laws
112 of the United States, do hereby demand the said Anderson Hatfield, Johnson Hatfield, Cap. Hatfield, Valentine Hatfield, Elias Hatfield, C. Carpenter, James Murphy, Doc. Mahorn,

Plyant Mahorn, Silkirk McCoy, Albert McCoy, L. D. McCoy, Thomas Chambers, Lark Varney, Andy Varney, Daniel White, Sam'l Mahorn, Alexander Messer, John White, and Elijah Mounts, fugitives from the justice of the laws of this State, and make known to your excellency that I have appointed Frank Phillips my agent to receive said fugitives and bring them to this State, having jurisdiction of the said offense, that they may abide their trial for the crimes for which they stand charged.

I herewith annex and submit to your excellency a copy of the indictment upon which the demand is founded, which I certify to be authentic.

In testimony whereof I have hereunto set my hand and caused the seal of the Commonwealth to be affixed, at Frankfort, the tenth day of September, in the year of our Lord one thousand eight hundred and eighty-seven, and in the ninety-sixth year of the Commonwealth.

S. B. BUCKNER.

By the Governor:
GEORGE W. ADAMS,
Secretary of State,
By WILLIS L. RINGO,
Assistant Secretary.

A copy of the indictment referred to is as follows:

Indictment.

Pike County Court.

THE COMMONWEALTH OF KENTUCKY
against
ANDERSON HATFIELD, JOHNSON HATFIELD, CAP. HATFIELD,
113 Valentine Hatfield, Elias Hatfield, C. Carpenter, James Murphy, Doc. Mahorn, Plyant Mahorn, Silkirk McCoy, Albert McCoy (Kirk's son), L. D. McCoy (Kirk's son), Thomas Chambers, Lark Varney (Henderson's son), Andy Varney (Henderson's son), Daniel White, Samuel Mahorn, Alex. Messer, John White, Eligah Mounts (Beech Creek).

The grand jury of Pike county, in the name and by the authority of the Commonwealth of Kentucky, accuse Anderson Hatfield, Johnson Hatfield, Cap. Hatfield, Valentine Hatfield, Elias Hatfield, C. Carpenter, James Murphy, Doc. Mahorn, Plyant Mahorn, Selkirk McCoy, Albert McCoy (Kirk's son), L. D. McCoy (Kirk's son), Thomas Chambers, Lark Varney (Henderson's son), Andy Varney (Henderson's son), Daniel White, Samuel Mahorn, Alexander Messer, John White, and Eligah Mounts of the crime of wilful murder, committed as follows: The said defendants, as hereinbefore named, on the 9th day of August, 1882, in the county and circuit aforesaid, did wilfully — feloniously kill, slay, and murder Randolph McCoy by shooting him with a gun or pistol loaded with powder and ball, the precise weapon, whether gun or pistol, is unknown to the grand jurors,

and from which shooting he, the said Randolph McCoy, then and there immediately died, and to commit which murder the aforesaid defendants, as hereinbefore named, *was* present at the commission of the said murder *after* the said Randolph McCoy, *and*
114 hereinbefore described. Tto commit said murder aforesaid defendants did conspire together, against the peace and dignity of the Commonwealth of Kentucky.

S. G. KINNER,
Commonwealth's Attorney.

A copy.
Attest:

G. W. PINSON,
Clerk Pike Circuit Court.

The following is the endorsement on the foregoing indictment:
The Commonwealth of Kentucky *versus* Anderson Hatfield & others. Indictment, wilful murder. True bill. W. O. B. Batliff, foreman. Commonwealth's witnesses: Jacob Prichett, Mathew Hatfield, Anderson Hatfield (George'- son), Richard Hatfield, James McCoy, Talbert Hatfield, Lewis Farley, Joseph Hatfield, Samuel McCoy, A. M. Hatfield, James Francisco, John C. Francis, Andrew S. Ferrill, Samuel Simkins, Hariett Simpkins, Uriah McCoy (Purrie's son), George Sprouse, Floyd Hatfield, Mont. Staffons, Scott Allen, Lark McCoy. Filed Sept. 14th, 1882. R. M. Ferrill, C. P. C. C. S. G. Kinner, Commonwealth's attorney. Bench warrant issued Sept. 18th, 1882.

The affidavit of Frank Phillips, referred to in the foregoing requisition, is as follows:

STATE OF KENTUCKY, *County of Pike:*

115 The affiant, Frank Phillips, states that he was appointed by the Governor of the State of Kentucky as the agent of the State to proceed to the State of West Virginia and to receive from the authorities of that State the persons of Anderson Hatfield, Johnson Hatfield, Cap. Hatfield, Valentine Hatfield, Elias Hatfield, C. Chambers, James Murphy, Doc. Mahorn, Plyant Mahorn, Silkirk McCoy, Albert McCoy, L. D. McCoy, Thomas Chambers, Lark Varney, Andy Varney, Daniel White, Samuel Mahorn, Alex. Messer, John White, and Eligah Mounts. Affiant states that these parties stand indicted in this county and State in three separate cases for willful murder; that he is well acquainted with the facts, and knows that the parties above named are charged with willful murder, and that they are fugitives from justice, and that the demand or application is made in good faith for the punishment of crime and not for the purpose of collecting a debt as pecuniary mulct *as* of removing the alleged fugitives to a foreign jurisdiction with a view there to serve them with process.

FRANK PHILLIPS.

Subscribed and sworn to before me by Frank Phillips this the 10th day of October, 1887.

W. M. CONNELLY,
Notary Public, Pike County, State of Ky.

The letter of Gov. E. W. Wilson to Frank Phillips, dated Dec'r 17th, 1887, marked No. 7, is as follows:

STATE OF WEST VIRGINIA, EXECUTIVE DEPARTMENT,
CHARLESTON, *Dec'r 17th*, 1887.

Frank Phillips, Esq.

SIR: Yours of the 13th inst., enclosing fifteen dollars for fees
116 in the matter of a requisition for Hatfields and others, rece'd. Information has come to me that certain parties have received a large sum of money from parties named in the requisition. The money for fees should be sent to the secretary of state—not to me. I herewith return the fifteen dollars, and shall make enquiry into this matter. Requisitions and warrants thereon are issued to subserve the ends of justice and for no other purpose.

Very respectfully, E. W. WILSON.

FRANKFORT, KY., *Jan'y 25th*, 1888.

I enclose this letter to Governor S. B. Buckner.

I. LEE FURGUS,
Co. Att'y, Pike Co.

The telegram from Governor Wilson to Governor Buckner, Jan'y 26th, 1888; letters from Governor Wilson to Governor ——, Jan'y 26th, 1888; Governor Wilson to Governor Buckner, Jan'y 30th, 1888, Nos. 9, 10, 11, 12, 13, & 14, respectively, are as follows:

CHARLESTON, *Jan. 26th*, 1888.

To his excellency S. B. Buckner, Frankfort, Ky.:

You have probably noticed in yesterday's papers an alleged conflict in this State between the McCoys and Hatfields parties, in which William Dempsey was killed. My information is that Dempsey was killed while acting as a deputy in assisting the officers of the law in arresting Frank Phillips and three of the McCoys on a warrant for the murder of James Vance.

E. W. WILSON,
Gov. W. Va.

FRANKFORT, KY., *Jan. 26th*, 1888.

117 His excellency E. W. Wilson, Gov. W. Va., Charleston, W. Va.:

My information differs from your excellency's in reference to the alleged conflict on the Sandy. Steps are being taken to prevent any aggression by Ky. citizens on those of W. Va. I will communicate by mail.

S. B. BUCKNER,
Gov. of Ky.

CHARLESTON, *Jan. 26th*, 1888.

SIR: Since my telegram of yesterday I have received positive information that William Dempsey was killed last Thursday in Logan county, this State, while acting as a deputy under the authority of

a warrant for the arrest of Frank Phillips and others for the murder of James Vance by a party of thirty or forty men from Kentucky armed with Winchester rifles. My information is of the most trustworthy character that Vance had been waylaid but a short time before in Logan county by twenty-three armed men from Kentucky, led by Phillips, and murdered in the most brutal manner.

A warrant was sued out and placed in the hands of a constable for the arrest of Phillips and others. The constable, on learning that the Phillips band were in Logan county, summoned a posse of thirteen, including Dempsey, to assist in making the arrest. While the posse were on the search for the parties named in the warrant they were fired upon by the Phillips marauders and Dempsey was killed.

From what I can learn this feud dates back to the early years of the war—the Hatfields and McCoys representing opposite
118 sides of the service—and commenced by the shooting of one of the Hatfields by the McCoys. It was limited to these two families, and seems to have ended by the killing of one of the Hatfields and three of the McCoys in 1881 or 1882. Recently the hope of reward has prompted a set of men quite as lawless as either the Hatfields or McCoys to the commission of heinous crimes against the laws of this State and upon its citizens while discharging their duty as officers of the law.

I have also been informed, though not officially, that a number of persons, without warrant, have been forcibly seized and taken from this State by the same band and are now confined in the jail of Pike county. I shall communicate with your excellency upon this subject as soon as I receive definite information. I have sent a reliable agent to Logan county to ascertain and report the whole facts of the matter. If you will pursue that course would it not enable us to adopt similar measures for the suppression of the lawless on both sides of the line?

E. W. WILSON.

To his excellency S. B. Buckner, Governor of Ky.

DATED FRANKFORT, KY., *Jan. 30th*, 1888.

To his excellency Gov. Wilson:

Adg't General Hill is en route to Pike Co. He is instructed to confer with your agent in Logan Co. Please give corresponding instructions to your agent with a view of repressing disorders and quieting public excitement on both sides of the river.

S. B. BUCKNER,
Gov. of Ky.

119 CHARLESTON, *Jan. 30th*, 1888.

To his excellency S. B. Buckner, Frankfort, Ky.:

I sent an agent on the 23d inst., and expected him here to-night. A mass meeting of Logan county has, by resolution, asked that your excellency send troops to the border, and that I do likewise. I have

ordered 60 to Logan county to assist the civil authorities. They will report here to-morrow night, but cannot reach the southern side of Logan before the 3d prox. May I request that your excellency — a like number of troops to the scene of the trouble? Will communicate by mail immediately.

E. W. WILSON,
Gov. W. Va.

CHARLESTON, *Jan. 30th*, 1888.

To his excellency S. B. Buckner, Frankfort, Ky.:

My agent has just returned from the scene of the troubles and reports that the belligerent parties on both sides have disbanded. I have therefore countermanded the order directing the military to Logan county.

Your ob't serv't, E. W. WILSON,
Gov. W. Va.

120 Letters of Governor Buckner to Governor Wilson, dated Jan'y 30th, 1888, above referred to, is as follows:

FRANKFORT, *Jan'y 30th*, 1888.

SIR: On the 10th day of September last, in the discharge of what I conceived to be my duty as Governor of this Commonwealth, I issued a requisition upon your excellency for the rendition of Anderson Hatfield and others, charged by indictment with willful murder, committed in Pike county, in this State, on the 9th day of August, 1882.

On the 30th day of Sept., 1887, said requisition was returned to me with a letter from your excellency, calling my attention to a law of West Virginia, a copy of which you were kind enough to enclose, and which you seemed to think prevented a compliance on your part with my demand until it should be accompanied by the affidavit indicated in the law above referred to. Without then stopping to discuss the correctness of your construction of the law in question or its validity, even conceding your construction to be correct, the desired affidavit, having been obtained, was attached to said requisition, which was again enclosed to your excellency on the 13th day of October, 1887.

Having thus complied with every condition which your excellency then indicated that you thought necessary, I had every reason to suppose that steps had been taken for the rendition of the fugitives named, and I knew nothing to the contrary until early in the present month, when I was advised by the authorities of Pike county that your excellency had for some cause declined, up to that time, to issue your warrant for the arrest and delivery of the par-
121 ties referred to, and that, in addition to the crimes for which they then stood indicted, they had recently perpetrated other crimes of the most atrocious character in the same locality.

Accordingly, on the 9th inst., I wrote your excellency, advising you of the information which I had received and requesting to be

advised whether there was then anything which prevented the rendition of these criminals.

In response to this letter I received only a few days since your letter of January 21st, in which you did me the honor to state your reasons for not complying with my request, and in which, amongst other things, you say, "And although the application for the requisition does not appear to be made or supported by any official authority of Pike county," &c.

I confess myself at a loss to understand how your excellency could possibly know anything whatever about the character of the application made to me for a requisition in this case. I did not attach it to the requisition enclosed to your excellency, for the obvious reasons that the law governing the extradition of fugitives nowhere requires it or in any way intimates that it would even be proper to do so. On the contrary, it seems to contemplate, the papers being correct in other respects, that the executive making the demand must be the sole judge of the circumstances under which it would be proper for him to issue his requisition. I therefore had no reason to suppose that your excellency would feel it your duty even to enquire into this point, especially as you had, in your first letter returning the requisition, given no such intimation, but if your excellency desires to be advised as to this branch of the case I certainly have no objection to telling you that the application for the requisition and records in this case
was made by the county judge of Pike county, endorsed
122 by the judge of the district court and urged by the Commonwealth's attorney of the district, who was personally present when the application was presented. In referring to Elias Hatfield and Andrew Varney your excellency is pleased to say: "The many affidavits and statements of reliable persons showing that these two men were miles away from the place at the time of the killing of McCoy induced me to withhold for the present the warrant as to them, believing that when your excellency was made acquainted with the facts their rendition would not be demanded." The indictment accompanying the requisition charges that these two men were present and aided in the killing. This being so, I respectfully submit that the guilt or the innocence of these men is a question which it is not the province of your excellency or myself to decide, but one which the courts having jurisdiction of the case can alone rightfully determine, and if, as you seem to suppose, the innocence of these two men can be so easily established it would seem strange that they had not long before this voluntarily appeared in the court where they stand accused, which is so convenient to their homes, and which they might, if such be the case, be triumphantly vindicated against this grave charge. From my knowledge of the enlightened and upright judge of the court in which they stand charged I feel assured that they would be awarded a speedy and fair trial, but if they think otherwise, and have fears either as to the impartiality of the judge or as to the prejudice of the community in whose midst they are to be tried, they can, under our laws, not only swear off the judge, but can on proper showing easily obtain

a change of venue to another county, in which no prejudice
123 whatever exists. Under these circumstances your excellency can readily see that they would in any event have no difficulty whatever in obtaining a fair and impartial trial. Before receiving your letter I had been fully apprised of the efforts on the part of P. A. Kline to secure a withdrawal of the requisition and rewards in this case. In fact, the cool proposition made to me by the indicted parties, through their attorney, Mr. Auxier, to the effect that they would obligate themselves not to come again into Kentucky provided I would withdraw the requisition and rewards named, was endorsed by Mr. Kline, who had previously shown an active interest in their application.

But their proposition I, of course, declined even to entertain, much less to agree to; and even admitting the truth of the affidavit enclosed by your excellency, which charges in terms that the friends of the indicted parties succeeded in bribing Kline, their former enemy, to urge the acceptance of their cool proposition, I cannot see why this should cause your excellency to hesitate about issueing your warrant for the rendition of these parties to the proper authorities upon whose application the requisition was issued, and whose conduct is not even questioned. Indeed, it seems to me that the questionable means which the friends of the indicted parties have been employing to secure a withdrawal of the requisition and rewards in this case ought of itself to induce your excellency to regard with suspicion the efforts which they seem to be making to prevent the issueing of your warrants for their apprehension and delivery.

My information as to the history of these troubles, briefly
124 stated, is as follows: On the 9th day of August, 1882, Anderson Hatfield and twenty-two other desperate characters of Logan county, West Virginia, residing near the State line, crossed the river into Pike county, Kentucky, arrested three sons of Randolph McCoy, and, having tied them to trees, deliberately shot them to death. It was for this cruel and inhuman murder that the parties named in my requisition were indicted in the Pike circuit court, three separate indictments having been found against the parties named, for the murder of the three McCoys, brothers, respectively, though it is possible only one of these indictments was attached to the requisition issued upon your excellency on the 10th September last. So far from "no more having been made in this matter for more than five years after the finding of the indictments," as stated by your excellency, the fact is that bench warrants have all the while been in the hands of the officers of Pike county in the hope that these parties, who lived near the State line and were frequently seen in Kentucky, could be arrested by the authorities of this State without the necessity of applying for a requisition upon the Governor of West Virginia; and my predecessor at one time offered a reward for those who were supposed to be most responsible for the murder; but the indicted parties, knowing the efforts which were being made for their arrest, though frequently seen in Kentucky, always came in crowds, well armed, so that it was impossible to ar-

rest them before they could return to the West Virginia side of the river.

They have on several occasions while in Kentucky unmercifully whipped defenseless women and inoffensive men, whose only provocation was some alleged remark in disapproval of their lawless conduct. The names of the various persons who at different times have been brutally assailed and the circumstances connected therewith have been furnished me, but it is not deemed necessary here to mention them in detail. Finally, on the 10th of September last, upon the application of the local authorities, as heretofore indicated, I issued my requisition for all the persons named in the indictment for the murder of the McCoy brothers and offered suitable rewards for four of the number represented as being the leaders of the party and most responsible for their conduct.

This matter stood until the latter part of December, when Frank Phillips, named as agent in the requisition for these parties, having sent the required fees and being unable to hear anything from your Excellency, went into West Virginia in company with two others and, without any disturbance or conflict of any kind, succeeded in capturing Thomas Chambers, Silkirk McCoy, and Moses Christian, three of the persons named in the indictment for the murder of the McCoy brothers, who were brought to Kentucky and lodged in the jail of Pike county. This so incensed the Hatfield party that on the night of January 1 a company of twelve men, headed by Cap. Hatfield and James Vance, Sr., came from West Virginia into Pike county and, having surrounded the house of Randolph McCoy, the father of the three McCoy brothers, who had been murdered in 1882, commanded him to surrender, saying they were the Hatfield crowd. They then forced their way into a room where his three daughters were sleeping, shot one of them through the heart and set fire to the house. The old man and his son Calvin, seeing that they intended to kill them, made the best defense they could, but the flames soon drove them from the house. The son, in his efforts to escape, was riddled with bullets, and the old man, who ran in an opposite direction, was fired upon by several of the party, but escaped unhurt. His wife had in the meantime come out of the house and begged for mercy, but was struck in the head and side with a gun, breaking her ribs and knocking her senseless to the ground, after which she was thrown back into the house to be burned, but was dragged out by her two daughters as they left the burning building. Some days thereafter twenty-six men armed themselves and went into West Virginia in pursuit of the perpetrators of this atrocious crime, and on reaching the house of Anderson Hatfield, so far from abusing or mistreating his wife, as has been represented to your excellency, they treated her kindly, and at her request left some of their party with her to quiet her fears, but after leaving there in search of the men they were suddenly fired upon by James Vance, Sr., Capt. Hatfield, and others, and in the fight which followed James Vance, Sr., was killed, having two pistols on his person and a repeating rifle in his hands when killed.

Old Randolph McCoy was not with the pursuing party, as has been represented to your excellency, but was at the time in Pikeville, Ky., as the citizens of that place will all testify.

The pursuing party then returned to Kentucky, and, being reinforced by ten additional men, went back the next day and succeeded, without the firing of a gun, in capturing six more of the men indicted for the murder of the McCoy brothers in 1882, bringing them back to Kentucky, where they were lodged in the jail of Pike county. Eight or ten days thereafter Frank Phillips and eighteen others went again into West Virginia in pursuit of the re-
127 maining parties belonging to what is known as the Hatfield crowd, and only a short distance from the State line were met by Capt. Hatfield and ten armed men, who fired upon Phillips and his posse from ambush before the- were aware of their presence. Phillips and his party returned the fire, killing Dempsey and putting the others to flight.

Phillips and his party then returned to the Kentucky side, but went back on the following day, and as to what has since occurred I have no information.

The foregoing account, which differs so widely from that received by you, was obtained from the county attorney of Pike county, who claims to have taken great pains to ascertain the real facts, and who seems to have no doubt about its correctness; but I, of course, understand how difficult it is to arrive at the exact facts in an affair of this kind from the statements which he may have heard from the parties on either side. I regret exceedingly that any portion of the citizens of Pike county should have attempted under any circumstances to arrest citizens of West Virginia for crimes committed in this State without first obtaining the requisite authority therefor, but if the foregoing account of this affair be anything like correct I am sure your excellency will agree that it is not surprising that the people of Pike county, having employed every legitimate means for the apprehension and delivery of these men and failing therein, should have have determined to resort to such other steps as might be necessary to bring to justice the desperate characters who were not only burning houses but killing unoffending men and help-
128 less women in their midst. I feel assured that your excellency has, from your stand-point, done in this case what you conscientiously conceived to be your duty in the premises, but I cannot concur in the views which seem to be entertained by your excellency as to your right to investigate the circumstances under which my demand was made or to inquire into the guilt or innocence of the fugitives therein named, and if, instead of stopping to inquire into these questions, your excellency had thought proper to take necessary steps for the apprehension and delivery of the fugitives demanded, I respectfully — that in — probability the disturbance above referred to would not have occurred.

Since receiving you letter of the 28th instant informing me that you had "sent a reliable agent to Logan county to ascertain the whole facts of the case" and suggesting that I pursue a similar course, I have directed the adjutant general of this State to go at

once to Pike county, with instructions to make a thorough investigation and report the facts as speedily as possible.

I am satisfied that Frank Phillips, the agent appointed by me to receive the fugitive named in my requisition, is not the murderous outlaw that your excellency seems to suppose, but, as he has undertaken to arrest some of these parties in West Virginia without your warrant and is therefore objectionable to you, I will, when your excellency indicates your readiness to surrender the persons demanded, take pleasure in designating another agent for that purpose, and in the meantime I beg you to be assured that I shall always be
129 glad to co-operate with your excellency in every proper measure for the preservation of peace and good order between the citizens of the two States over which we have the honor respectively to preside.

I have the honor to be, very respectfully, your obedient servant,

S. B. BUCKNER.

His excellency E. W. Wilson, Governor of West Virginia.

Letter from Governor Wilson to Governor Buckner, dated Feb'y 13th, 1888, No. 16; affidavits of Pinson, Auxier, & Hatfield, Nos. 17, 18, & 19, are as follows:

CHARLESTON, *February 13th*, 1888.

SIR: Sec. 12, ch. 14, Code West Virginia, provides that *that* the Governor, in any case authorized by the Constitution of the United States, may, on demand, deliver over to the executive of any other State or Territory any person charged therein with treason, felony, or any other crimes committed therein, and he may, on application, appoint an agent to demand of the executive authority of any other State or Territory any offender fleeing from the justice of this State, provided that such demand or application is accompanied by some evidence that the party charged is a fugitive from justice, and that the demand or application is made in good faith for the punishment of crime and not for the purpose of collecting a debt or pecuniary mulct or of removing the alleged fugitive to a foreign jurisdiction with a view there to serve him with civil process. Whether
130 the demand be by the executive of another State or the application to the executive of this State the same evidence is required.

This statute, in substance, has been enacted in almost every State in this Union, and a failure to comply with its provisions would be ample ground to release a party on *habeas corpus* proceedings in this State. As your excellency is aware, the requisition for Anderson Hatfield and others was returned, together with the statutes mentioned. In order that the proper evidence should be prepared and presented the necessary affidavit, dated October 10th, 1887, was made by Frank Phillips and was received by me some days thereafter.

I directed the secretary of state to issue warrants for all the parties named in the indictment—twenty in number—excepting Elias

Hatfield and Andrew Varney. P. A. Cline having the matter in charge, the following letter was addressed to him:

STATE OF WEST VIRGINIA,
OFFICE OF SECRETARY OF STATE,
CHARLESTON, *Nov.* 21*st*, 1887.

P. A. Cline, Esq., Pikeville, Ky.

DEAR SIR: The requisition of his excellency the Governor of Kentucky for Anderson Hatfield, Sr., and twenty others, jointly, has been honored by the Governor as to all the parties named except as to Elias Hatfield and Andrew Varney. These two parties have
131 produced evidence before the Governor that shows beyond question that they were in nowise connected with the murder for which they are indicted along with the others in the said requisition. The warrants for the arrest of the 18 named in the requisition will be issued upon receipt of $54.00, the fees, &c., ther-on due this office.

Yours truly, HENRY S. WALKER,
Secretary of State,

P'r F.

On December 13th last I received the following from Frank Phillips, which is evidently in the handwriting of P. A. Cline:

OFFICE OF PERRY A. CLINE, ATTORNEY AND
COUNSELLOR AT LAW, OFFICE BACK OF
COURT-HOUSE, PIKEVILLE, KY., *Dec.* 13*th*, 1887.

To his excellency Governor Wilson.

DEAR SIR: Enclosed please find 15 dollars to pay fees due your office upon the issue of State warrants for the following-named parte*ys*: Wa'nt for Andrew Hatfield, Johnson Hatfield, Cap. Hatfield, Daniel White, Andrew McCoy (Kirk's son). Please send warrants to this place to Frank Phillips, the agent appointed by the Governor of Kentucky. As to Elias Hatfield and Andrew Varney, we don't care for; did not intend to interrupt them. Some of the party *is* dead and some gone and left the country. The reason they all *was* named in the requisition was they were all jointly
132 indicted, and—just cop*y*ed the indictment; so if we want any others of the part*ey*s we will send for the warrants hereafter.

Yours truly, FRANK PHILLIPS.

The money was returned to Frank Phillips, and he was informed that information has been received by me that the requisition proceedings were being used to secure money from the Hatfields, and that I should call the attention of your excellency to that fact. I then had evidence, satisfactory to myself, that the requisition of your excellency was being abused and prostituted to base purposes, and that a warrant from me would be used in the same manner. I therefore withhold the warrants for positive proof; it came.

I received the communications of your excellency of Jan. 9 ult.

announcing the reason of delay in issuing warrants upon the requisition and made the following response:

STATE OF WEST VIRGINIA,
EXECUTIVE DEPARTMENT, CHARLESTON, *Jan.* 21, 1888.

SIR: On account of sickness in my family and necessary absence with the board of public works, an unavoidable delay has occurred in answering your communication of the 9th inst.

Although the indictments of Anderson Hatfield and others were found more than five years before the application to either
133 your excellency or your predecessor for a requisition, and the parties charged were continuously residing in the neighborhood of the alleged crime, and although the application for the requisition does not appear to be made or supported by any official authority of Pike county, I directed the warrants to issue as soon as the affidavit required by the *affidavit* of this State was filed against the parties named, excepting Elias Hatfield and Andrew Varney. The many affidavits and statements made by reliable persons showing that these two men were miles away from the place and at the time of the killing of McCoy induced me to withhold, for the present, the warrant as to them, believing that, when your excellency was made acquainted with the facts, their rendition would not be demanded. After the warrants were directed and prepared, as above mentioned, reliable information was received from various persons (and amongst them F. D. Williams, who *who* was appointed agent by your excellency in the matter of the requisition of E. and S. Perdue) that the requisition and expected warrants were being used not to secure the ends of public justice, but to extort money from the accused.

"I enclose copies of affidavits of G. W. Pinson, clerk of the criminal court of Pike county; Johnson Hatfield, and A. J. Auxier, an attorney of Pike county; also a copy of a letter of Frank Phillips, which is evidently in the handwriting of Cline, and extracts from a letter of John A. Sheppard, an attorney of Logan county, this State.

134 "I am sure your excellency will conclude with me that neither Cline nor Phillips nor any of the persons engaged in the recent violations of the law are proper persons to entrust with process of either Kentucky or West Virginia." Considering that no move was made in this matter for more than five years after the finding of the indictment, although the accused have continued their residence in the same locality during all that time, I would be glad if such enquiry were directed as to your excellency *as* may seem proper, so that warrants may issue for those only against whom there is some evidence of guilt.

Respectfully & obediently, E. W. WILSON.

The following are copies of the affidavits referred to in the above communication:

COMMONWEALTH OF KENTUCKY, *Pike County,* } *To wit:*

I, G. W. Pinson, clerk of the criminal court of said county, do hereby certify that on or about the 6th day of Sept., 1887, I copied, at the request of P. A. Cline, the three indictments in said court against Anderson Hatfield, Cap. Hatfield, and Johnson Hatfield, Jr., *et al.*, for the murder of the McCoys, and that I delivered said copies to said P. A. Cline, to be used by him for the purpose of obtaining from — Governor of this State a reward for said parties and also to obtain from said Governor a requisition upon the Governor of West Virginia for the arrest and delivery of said parties to the proper authorities of this State.

135 Given under my hand and the seal of said court this the 29th day of December, 1887.

[SEAL.] G. W. PINSON, *Clerk.*

STATE OF WEST VIRGINIA, *Logan County,* } *To wit:*

This day personally appeared before me, the undersigned authority, Johnson Hatfield, Sr., who, being duly sworn, upon oath, says—

That he is acquainted with the parties who stand indicted in the criminal court of Pike county, Ky., for the murder of the McCoys; that during the month of December, 1887, he, together with A. J. Auxier and James York, who were employ-d counsel for the parties so indicted, made a verbal agreement with one P. A. Cline, an attorney-at-law at Pike C. H., Ky., which was about as follows:

Said Cline, upon his part, agreed that if Anderson Hatfield *et al.*, who stood indicted as aforesaid, would deposit with A. J. Auxier the sum of $225, to be paid him (Cline) if he succeeded in his undertaking, that he would recom-end to and use all his influence with the Governor of Kentucky to have him take no further steps for the arrest of the said parties indicted as aforesaid; and this affiant, upon the part of the said Anderson Hatfield *et al.*, agreed and did deposit with said Auxier the said sum of $225, to be paid to said Cline if he succeeded in getting the Governor to take no further steps

136 for the arrest of the said parties. Said Cline claimed that he had spent $225 in procuring rewards and a requisition upon the Governor of West Virginia for the arrest of the said Anderson Hatfield *et al.*

This affiant further states that it was well understood at the time of the making of said agreement by all parties interested that the said Cline had not spent any such sum of money in the manner stated by him, but that it was only an excuse for him to take shelter behind.

JOHNSON HATFIELD.

Taken, subscribed, and sworn to before me this January 2d, 1887.

JOHN A. SHEPPARD,
Notary Public for Logan County, W. Va.

STATE OF KENTUCKY, *Pike County:*

The affiant say- he is employ-d counsel for some of the parties indicted in three cases for the murder of the McCoys, and that after the rewards and requisitions were offered for the arrest of Anderson Hatfield and others some money was left in my hands to pay fees and expenses in trying to get the Governor of Kentucky to withdraw the rew-rds, and P. A. Cline was to have, as affiant remembers, two hundred and twenty-five dollars if he would recom-end the withdrawal. Mr. Cline wrote to the secretary of state recom-ending the same on conditions, which was taken to the secretary and delivered to him. This amount he claimed had been expended
137 by him in procuring the rewards and requisitions.

A. J. AUXIER.

Sworn to before me by A. J. Auxier this December 22d, 1887.
[SEAL.] HI. WILLIAMSON.

STATE OF KENTUCKY, *Pike County:*

During the months of December and January last this same Frank Phillips, who made the affidavit for the requisition; who was appointed agent to receive the accused parties; who now, with twenty-two others, stands charged with the murder of two citizens of Logan county, this State—one an officer of the law—and for whom, some days ago, I issued a requisition upon your excellency, crossed over into West Virginia at the head of *of* an armed body of men, and, without warrant or any process of law whatever, forcibly seized and carried away nine of its citizens, who have ever since been confined in the jail of Pike county, Kentucky, the demand for *for* whose return your excellency has refused. In the communication of the 20 ult. your excellency expresses a readiness to appoint another agent in the place of Frank Phillips. Before the date last mentioned all the persons referred to above had been unlawfully seized and taken to the State of Kentucky, where they are still detained. A warrant issued by me before the return to this State of the persons so seized and detained would be but and executive ratification of acts
138 of lawless violence which neither the honor of this State nor the peace and safety of its people will permit me to approve or condone. Instead of these Phillips raids into the territory of a sister State being allowed to stand as examples for the invitation of like occurrences, I am impressed with the belief that they should be made examples by judicial determination, which will discourage their repetition either for or from this State.

I have caused to be instituted in the district court of the United States for the district of Kentucky such legal proceedings as seem to me proper for the settlement of the questions involved. When these matters are disposed of I am sure we shall be able to proceed in the manner provided by law.

With the assurance of a ready co-operation with your excellency

in the maintenance of peace and order and the vindication of the law, I have the honor to be your obedient servant,

E. W. WILSON.

To his excellency S. B. Buckner, Governor of Kentucky.

COMMONWEALTH OF KENTUCKY, *Pike County*, } *To wit:*

I, G. W. Pinson, clerk of the criminal court of said county, do hereby certify that on or about the 6th day of Sept., 1887, I copied, at the request of P. A. Cline, the three indictments pending in said court against Anderson Hatfield, Cap. Hatfield, and Johnson
139 Hatfield, Jr., *et al.* for the murder of the McCoys, and that I delivered said copies to said P. A. Cline to be used by him for the purpose of obtaining from the Governor of this State a reward for said parties, and also to obtain from said Gov. a requisition upon the Gov. of West Virginia for the arrest and delivery of said parties to the proper authorities of this State.

Given under my hand and the seal of said court this the 28th day of December, 1887.

G. W. PINSON, *Clerk.*

STATE OF WEST VIRGINIA, *Logan County*, } *To wit:*

This day personally appeared before the undersigned authority Johnson Hatfield, Sr., who, being duly sworn, upon his oath says that he is acquainted with the parties who stand indicted in the criminal court of Pike county, Ky., for the murder of the McCoys; that during the month of November, 1887, he, together with A. J. Auxier and James York (who were employed counsel for the parties so indicted), made a verbal agreement with one P. A. Cline, an attorney-at-law, at Pike C. H., Ky., which was about as follows: Said Cline, upon his part, agreed that if Anderson Hatfield *et al.*, who stand indicted as aforesaid, would deposit with A. J. Auxier the sum of $225.00, to be paid to him (Cline) if he succeeded in his undertaking, that he would recom-end to and use all his influence with the Gov. of Ky. to have him take no further steps for the arrest of the said parties indicted as aforesaid; and this affiant, upon the part of the said Anderson Hatfield *et al.*, agreed and did deposit with said Auxier the said sum of $225.00, to be paid to said Cline
140 if he succeeded in getting the Gov. of Ky. to take no further steps for the arrest of said parties. Said Cline claimed that he had spent $225.00 in procuring rewards and requisition- upon the Gov. of W. Va. for the arrest of the said Anderson Hatfield *et al.* This affiant further states that it was well understood at the time of the making of said agreement by all parties interested that said Cline had not spent any such sum of money in the manner stated by him, but that it was only an excuse for him to take shelter behind.

JOHNSON HATFIELD.

Taken, subscribed, and sworn to before me this Jan'y 3d, 1887.
JNO. A. SHEPPARD,
Notary Public for Logan County, W. Va.

STATE OF KENTUCKY, *Pike County:*

This affiant says he is employed counsel for some of the parties indicted in three cases for the murder of the McCoys, and that after the reward and requisition were offered for the arrest of Anderson Hatfield and others some money was left in my hands to pay fees and expenses in trying to get the Governor of Kentucky to withdraw the rewards, and Mr. P. A. Cline was to have, as affiant remembers, two hundred and twenty-five dollars if he would recom-end the withdrawel of said rewards, to be paid in the event the rewards were withdrawn. Mr. Cline wrote to the secretary of state recom-ending the same on certain conditions, which was taken to the secretary and delivered to him. This amount he claimed had been expended by him in preventing the rewards & requisitions.

A. J. AUXIER.

141 STATE OF KENTUCKY, *Pike County:*

Sworn to before me by A. J. Auxier this Dec'r 28th, 1887.
[SEAL.] HI. WILLIAMSON, *Clerk.*

The bill of exceptions above referred to is as follows:

Be it remembered that on the trial of this case the relator, to maintain the issue upon his part, offered in evidence the following letter, signed "P. A. Cline" and dated Nov. 5th, 1887, in words and figures following, to wit:

PIKEVILLE, KY., *Nov. 5th*, 1887.

To his excellency E. W. Wilson, Governor of W. Va.

DEAR SIR: Several days ago I had the required affidavid made out and sent with the requisi-on for the Hatfields and have received no answer or have not heard from it since. Will your excellency be so kind as to inform as to the status of the case? I understand that Hatfields has employ-d counsel to prevent the warrant from being issued on the requisition, and that they have sent in a petition. They have and can make the people sign any kind of petition they want. I was ra-sed near them men and know them; they are the worst band of mero-ders — ever existed in the mountains, and have been in arms since the war; they will not live as citizens ought to; they stand indicted in the county in 4 bad cases of murder, and one of *them* which occurred about a year ago, and — last year'- court *was* indicted for Ku-Kluxing and various other misdemeanor cases;
142 in fact, we cannot hold our elections without them crossing the line and run-g our citizens from the election grounds, and selling liquors in violation of the law, and these men has made good citizens leave their homes and forsake all they had, and refuse to let any person *to* even tend their lands. These facts are true and known to be true, both by the ceenty & Logan Co., W. Va. I understand that they are trying to make it ap-

pear to you that we want them for the purpose of murdering them. That is — false as anything can be. We want peace and want the laws executed, & do not want our citizens butchered up like dogs, as these men *is* doing. This county has never *jlaleed* any person, and wont do any harm to the Hatfields, except to see they get the law. We believe every person ought to answer for his conduct; that is the reason we ask the requisi-on. Our State has been compelled to remand these men and to ask the assistance of your excellency. I hope you will let me hear from this matter at your earl-est convenience. You can find out all about myself by writing to any of our officers or to any of our State officers, and learn whether or not I am a man of my word. I want to know what has been done as soon as your excellency can let me know. Please excuse this letter, as I deem it of great importance.

Yours, &c., P. A. CLINE.

To the introducing of which the respondent objected, which objection was sustained by the court; to which ruling of the court the relator excepts, and to save the benefit thereof prays that this his bill of exceptions may be sealed, signed, and made a part of the record, which is accordingly done.

JNO. W. BARR, [SEAL.]
District Judge.

143 The court filed a written opinion which is as follows:

The question presented to the court under this writ of *habeas corpus* is much narrower than the discussion of counsel would indicate. It is now settled that the courts of the United States will recognize the treaty obligations between the United States and other nations in regard to the extradition of fugatives from justice. In a recent case the Supreme Court recognized the provisions in regard to extradition in the treaty known as the Ashburton treaty, between the United States and Great Britain, and decided that a person extradited under that treaty could only be tried for the crime for which he had been extradited. This was not because of the comity which should exist as between nations, nor because the law of nations would have been violated, but because of the terms of the treaty and the act of Congress made to carry out treaty obligations in the matter of extradition of fugitives from justice. United States *vs.* Ranseline, 119 U. S. R., 407. It is also settled that there is not a personal right of asylum in a refugee who has fled this country being charged with crime to a foreign country. Thus if there be no treaty authorizing extradition, or if the fugitive from justice is not brought back from a foreign country under and according to the provisions of the treaty, if there be one, then the courts will not allow the fugitive to plead the mode of his capture and return to this country as an answer to his crime or in abatement to the indictment against him. Ker *vs.* Illinois, 119 U. S. R., 437; 110 Illinois State R., 630; State *vs.* Brewster, 7 U. S., 118. As to a person charged with crime in one of the States of this Union and who has fled to another State there is some

difference in the reasoning of the courts, but I think all of the American authorities concur in the conclusion that the refugee
144 under such circumstances has not a personal right of asylum in the State to which he has fled. They agree that the refugee when returned to the State wherein he committed the crime, by whatever means he may have been returned, cannot plead as an answer to his crime the manner of his return, and that he had not been extradited according to and under the law. The State *vs.* Smith, 1 Baily, 283; State *vs.* Ross, 21 Iowa, 467; *In re* Noyes, 17 Albany Law J., 407.

— Dow case a great jurist, Chief Justice Gibson, made an important statement, though it was not necessary in the decision of the case, and that was that, although a refugee from justice who is brought to the State where he is charged to have committed the crime from the State to which he has fled has not of himself the right of asylum if the chief executive of the State from which he has been brought by unlawful means demand his return, he should be discharged under a writ of *habeas corpus*. This is because of the sovereignty which still exists in the States of this Union and the comity which should exist between them. This court cannot, however, consider what is or should be the law of comity between the States of this Union, because, by the express language of the act under which this *habeas corpus* was issued, this court is confined to the inquiry whether the petitioner is detained in custody of the jailer of Pike county in violation of the Constitution or laws of the United States; nor can this court consider any controversy, if there be one, between the State of West Virginia and the State of Kentucky; all such controversy are within the exclusive jurisdiction of the Supreme Court.

The right to extradite a refugee who is charged with crime in one State and has fled to another State of this Union is governed
145 by the 2d section, art. 4, of the Constitution of the United States, which provides that "A person charged in any State with treason, felony, or other crimes who shall flee from justice and be found in another State shall, on demand of the executive authority of the State from which he has fled, be delivered up to be returned to the State having jurisdiction of the crime."

Congress has enacted laws to carry out this provision of the Constitution, and it is settled that both State and Federal courts may, under a writ of *habeas corpus*, revise the action of the Governor of a State upon whom a requisition is made if he acts and has the refugee arrested to see if the Constitution and the act of Congress have been complied with. The courts, however, cannot by any process known to the law compel a Governor upon such a requisition to act and have the refugee arrested and delivered over. Kentucky *vs.* Dennison, 24 How., 66.

It is claimed that the petitioner is detained in violation of the Constitution of the United States and this court should discharge him; and it is argued that the only process by which he could be extradited was the process provided by the Constitution of the United States and the laws made thereunder, and that in this case this pro-

cess has been invoked in so far as to give this court jurisdiction to revise the action taken under it.

It is quite clear, as will be seen from the statement of facts already read, that there was no action taken by the authorities of West Virginia under the requisition made by the Governor of Kentucky. Phillips, though designated by the Governor of Kentucky as the agent to receive from the proper authority of West Virginia the petitioner and others and bring them to Kentucky, never, in fact, acted as the agent of the State of Kentucky. It is true he represented himself to the petitioner as having authority from the Governor of West Virginia to arrest him, and as being the agent of the State of Kentucky, but that was false. The Governor of West Virginia never issued a warrant for the arrest of petitioner, nor had Phillips any authority to do so either from the Governor of West Virginia or the Governor of Kentucky or any one else. The process by which a lawful extradition could be made was never used, nor did Phillips act under color of authority, and hence this court cannot revise his action as being an effort to act under the provisions of the Constitution and laws of the United States.

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This brings us to consider the other proposition, which is that since the adoption of the 14th amendment to the Constitution of the United States neither a resident or citizen of one State having been charged with crime in another State and fled therefrom can be extradited from that State except by the due process of law which is provided in the Federal Constitution and the laws made thereunder, and unless he is thus extradited he is within the protection of that amendment.

It is true, I think, that the only legal mode of arresting a refugee from justice under such circumstances is under and according to the Constitution of the United States and the laws made thereunder and such State laws as may be constitutionally made in aid thereof. This being true, it may be insisted that due process of law, as required by that amendment, where a refugee from justice has fled from the State where he is charged with crime to another State, is, 1st, the mode of extradition as provided by the Federal Constitution and the laws thereunder; 2d, after he is returned to the State from — he has fled his arrest under and in accordance with the regular and lawful powers of that State.

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Hence, as he was not extradited according to or under the process provided by the Constitution and laws, but by force and against his will, he is now deprived of his liberty by the State of Kentucky without due process of law within the meaning of this amendment. That amendment declares, among other declarations, that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law."

It will be observed that this is not a grant to the citizen, resident, or sojourner as an individual of any right which he did not therefore have, but it is a limitation upon the power of the States put in the Federal Constitution.

It is not a declaration of what privileges or immunities citizens of the United States are entitled to, but is a declaration that no State of the Union shall abridge them.

The previous part of the section, which declares "all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside," created a national citizenship, but does not declare or define the privileges, rights, or immunities of a citizen of the United States Those rights, privileges, and immunities are assumed to exist from the relation of national citizenship, and have not yet been clearly defined by the courts, but whatever they may be, and however they may be extended to rights and privileges which are national in their nature, and beyond what therefore existed from the relation of State citizenship, I think national citizenship
148 would not confer upon a refugee who has fled from a State which he is charged with crime to another State the right of asylum in said State. We have seen no such individual right of asylum existed because of State citizenship; and if it existed at all it would be because of the sovereignty which still remains in the States. There is no reason why a national citizenship should confer the right of asylum which could arise and exist in a State of this Union only because of a reserved sovereignty in the State.

It is true that a citizen of a State and of the United States, both before and since the adoption of the 14th amendment to the Constitution, is entitled to be extradited under and according to the Constitution and the laws of the United States, and that he was and is entitled to a writ of *habeas corpus* and to his release when deprived of his liberty by force and not in accordance with the provisions of the laws regulating extradition. Before the adoption of this amendment and the act of 1867 the State courts alone could issue a writ of *habeas corpus* in favor of one seized by force and without any process of law, but since that time the Federal courts as well as the State courts would, perhaps, have jurisdiction in such cases because of the 2d section of article 4 of the Constitution and laws made thereunder and the national citizenship of the person forcably seized and held in custody.

The writ of *habeas corpus*, whither issued from a State or Federal court, would — no extra territorial force and neither court could discharge a person, although originally unlawfully seized, who
149 had — legally arrested and was then held by due process of law unless a State court should, as indicated by Chief Justice Gibson he would do, release the fugative from justice upon the demand of the Governor of the State from which he had been kidnaped as a matter of comity between the States. We therefore conclude that Kentucky has not abridged the privileges and immunities of the petition as a citizen of the United States by arresting him under a bench warrant after he was within the State.

The next inquiry is, Has the State of Kentucky deprived him of his liberty without due process of law within the meaning of th is amendment?

The petitioner has been indicted by a grand jury for willful murder

and was arrested in this State under and by the usual and regular process which has existed in this State from time immemorial for the arrest of persons indicted for crime by a grand jury. He is held by due process of law if the inhibition of the 14th amendment is to be limited to the process of the State which deprives him of his liberty. I-, however, the phrase "due process of law" is to include the means by which others brought him into this State, then it is not due process of law. Clearly the prohibition is upon "any State," and we think "due process of law" which is required to be used by the State is its own process, and not the process of another State or the process of the United States.

The Supreme Court has declined to define or attempt to define the meaning of "due process of law," and has wisely left its meaning to be ascertained by a gra-ual process of judicial inclusions and exclusion.

This case does not, ho-ver, require that we shall attempt to define it, because there can be no doubt the — Kentucky by which
150 the petitioner was arrested after he was brought into the State was "due process of law," so far — the process of that State is concerned.

If, therefore, we are correct in construeing the part of the 14th amendment as meaning that the prohibition is confined to a "State," and that the "due process of law" which is required to be used before any person can be deprived of his *file*, liberty, or property by a State is the due process of that State, then the petitioner's arrest and detention in the jail of Pike Co. is not a violation of this provision of the 14th amendment of the Constitution of the United States. The 5th amendment to the Constitution of the United States declared that no person shall be deprived of life, liberty, or property without due process of law. The uniform construction of this amendment is that the United States shall not deprive any person of life, liberty, or property without due process of law, and that the process which is me-nt is a Federal process. Indeed, the form and character of *one* Government precludes any other construction. When the question was first presented I was inclined to the opinion that due process of law, in the meaning of the 14th amendment, required the petitioner's extradition from West Virginia by a legal process as well as his legal arrest after he was in Kentucky, but a more critical examination has satisfied me that this amendment has not been violated by the State of Kentucky in thus arresting and detaining the petitioner in the jail of Pike county.

The petitioner must, therefore, be remanded to the custody of the jailer of Pike county, and it will be so ordered.

151 DISTRICT OF KENTUCKY, *ss:*

I, Samuel B. Crail, clerk of the district court of the United States for the district of Kentucky, at Louisville, do hereby certify that the foregoing one hundred and fifty-one pages, this included, contains a true and correct transcript of the case mentioned in the caption hereof as the same appears of record in my office.

Given under my hand and seal of said district court this 4th day of April, 1888.

[L. S.]

SAMUEL B. CRAIL, *Clerk*,
By HENRY F. CASSIN, *D. C.*

152 And afterwards, on the 6th day of April, 1888, the court being now sufficiently advised, it is adjudged that the judgment of the district court remanding the relator, Plyant Mahon, to the custody of the jailer of Pike county, Kentucky, be, and the same is hereby, affirmed, and that the said jailer, Abner Justice, do have and recover against him, the said Plyant Mahon, his costs herein laid out and expended, and that he may have execution therefor; to which ruling and judgment of the court the said Plyant Mahon excepts and prays an appeal to the Supreme Court of the United States, which is granted.

DISTRICT OF KENTUCKY, *ss:*

I, Samuel B. Crail, clerk of the circuit court of the United States for the district of Kentucky (at Louisville), do hereby certify that the foregoing 152 pages, this included, contain a true and
153 complete transcript of the record and proceedings in the case mentioned in the caption hereof.

Witness my hand and seal of said court this 13th day of April, A. D. 1888.

[Seal 6th Circuit Court, Ky. Dis., U. S. of America.]

SAM'L B. CRAIL,
Clerk Circuit Court U. S., Ky. Dist.

Endorsed on cover: Kentucky C. C. U. S. No. 1411. Plyant Mahon, appellant, *vs.* Abner Justice, jailor of Pike county, Kentucky. Filed April 17, 1888.

Given under my hand and seal of said district court this 4th day of April, 1888.

[L. S.]

SAMUEL B. CRAIL, *Clerk*,
By HENRY F. CASSIN, *D. C.*

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SAM'L B. CRAIL,
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Endorsed on cover: Kentucky C. C. U. S. No. 1411. Plyant Mahon, appellant, *vs.* Abner Justice, jailor of Pike county, Kentucky. Filed April 17, 1888.

127-700

Office Supreme Court U. S.
FILED
APR 23 1888
JAMES H. McKENNEY,
CLERK

IN THE SUPREME COURT OF THE

United States.

Ex Parte.

PLYANT MAYHON, *Appellant and Plaintiff in Error.*

IN THE SUPREME COURT OF THE United States.

Ex Parte.

PLYANT MAYHON, *Appellant and Plaintiff in Error.*

STATEMENT.

In September, 1887, the Governor of Kentucky made his requisition under the U. S. statutes upon the Governor of West Virginia for Plyant Mayhon, a citizen of West Virginia, as a fugitive from justice, charged with murder committed in Kentucky in 1882, and in said requisition appointed one Frank Phillips as agent of Kentucky to receive said Mayhon from the authorities of West Virginia. During the correspondence between said Governors, and without any warrant having been issued by the Governor of West Virginia upon said requisition, or any process from West Virginia authorities, said Phillips at the head of an armed band of citizens of Kentucky, crossed over into West Virginia, arrested appellant, declaring to

him at the time of the arrest that it was made under the authority of a requisition of the Governor of Kentucky, and a warrant from the Governor of West Virginia, and forcibly and against the will of appellant, conveyed him o Pike county jail, in Kentucky, where he was confined by the jailor thereof and deprived of his liberty. The next day, while confined in said jail, a warrant in the name of the State of Kentucky, was served on appellant to answer said indictment, and appellant held in said jail thereon, where he continues to be so confined and deprived of his liberty. After said confinement the Governor of West Virginia made demand upon the Governor of Kentucky for the release and return to West Virginia of appellant, which demand was refused.

Separate petitions were filed by the State of West Virginia and by Plyant Mayhon, praying writs of *habeas corpus*.

I. "No person shall be deprived of life, liberty or property, without due process of law."
Art. 5, Const. U. S.

"No State shall deprive any person of life, liberty or property, without due process of law."
Art. 14, sec. 1, Const. U. S.

II. The State of Kentucky has deprived appellant of his liberty without due process of law.

1. The only process of law to arrest a fugitive in another State is a requisition by the Governor of the State from which, and a warrant thereon by the Governor to which, the fugitive has fled.

State *vs*, Shelton, 79 N. C. 605.
Botts *vs*. Williams, 19 Ben. Monroe, 687–96.
Dow's Case, 18 Penn. 39.

a. This being the only process of law for the arrest of a fugitive, it is, necessarily, the due process of of law contemplated by the Constitution in such cases.

2. A State acts by its Legislative, Executive or Judicial authorities. Whoever by virtue of public position, under a State government, deprives another of life, liberty or property, without due process of law, violates the constitutional inhibition. Acts in the name and for the State, are the acts of the State.

Ex parte Va. 100 U. S. 339.

Va. *vs.* Reeves, 100 U. S. 313.

Strauder *vs.* W. Va. 100 U. S. 303, 313.

Neal *vs.* Delaware, 103 U. S. 370, 397.

a. Phillips was appointed agent of Kentucky; went into West Virginia as such agent; arrested appellant, and declared he was acting as such agent; conveyed appellant to Pike county jail and placed him under the jailor thereof, as such agent, and the State of Kentucky ratified his agency by receiving and detaining the stolen citizen of West Virginia.

III. It is the supreme duty of a State to protect its citizens. Service upon the one hand and protection upon the other, is as truly the compact between citizen and State as subject and King.

By the constitutional surrender of the power to make treaties; to enter into any agreement or compact with another State or country; to engage in war; and by the duty placed upon the United States to protect each State from invasion and domestic violence, the States have abdicated those modes of protection for their citizens which belong to a sovereign power; but the duty of the States to protect their citizens still remains; the remedy, only, is changed. If a citizen of a State be kidnapped and taken to a foreign country, the State has a right to demand of the United States that reparation be made; and if taken to a State of this Union, that relief be had in the Federal-Judicial tribunal.

IV. The Federal Court has jurisdiction in this case.

1. A person arrested under extradition proceedings is in custody under or by color of United States Statutes, and Federal Courts have jurisdiction.

Smith's Case, 3 McLean, 121, 129.
Holmes' Case, 14 Peters, 562.
Doo Woon's Case, 18 Fed. Reporter, 898.

2. *Habeas Corpus* lies in United States Courts where a prisoner is restrained of his liberty, by State authority, in violation of the Constitution of the United States.

Ex Parte Royall, 117 U. S. 241, &c.

The appellant's right is to remain in West Virginia, and West Virginia has a present and continuing right to his services, and a duty to protect him, until taken therefrom by due process of law.

a. The State of West Virginia has a right to petition for a writ of *habeas corpus*, in its own name, as it did in this case, because, being entitled to the services of its citizens in the payment of taxes, working of roads, serving on juries, &c., it is the person for whose relief the application is intended, under section 754, Revised Statutes, U. S.

A suit by the Governor, for and on behalf of the State, is a suit by the State.

Ky. *vs.* Gov., &c., 24 How. 66.

b. The citizen who is taken from a State, without due process of law, and conveyed to, and confined in another State, may, on his application for a writ of *habeas corpus*, rely upon the demand of the State whence he was taken, and the sovereign right of the State to such possession of its citizen will be vindicated in his person.

Dowe's Case, 18 Penn. 39.

V. Cases based upon extradition as between foreign countries have no application to the case at bar, which is a proceeding for the protection of a constitutional right.

Extradition to foreign countries is purely and exclusively a national power, to be exercised under treaty stipulation alone, and not by State governments.

Holmes' Case, 14 Peters 540, 561, &c.

Raascher's Case. 119 U. S. 407.

Ker's Case, 119 U. S. 436.

Holmes' Case, 12 Vt. 631.

Curtis's Case, 50 N. Y. 321.

Cooley's Const., lim., 5th ed., 23, note.

The above decisions dispose of the following cases cited in the Court below:

BREWSTER'S CASE.—He escaped into Canada, was brought back to Vermont against his will, and tried.

7 Vermont, 118. Decided in 1835.

HOWE'S CASE.—A Canadian, arrested in Canada, by a Canadian policeman, brought to New York, and then served with process.

4th. Parker 253. Decided in 1858.

VI. A person cannot be extradited on one alleged crime and tried on another.

Rauscher's Case, 119 U. S., 408. Decided in ——.

The last above case disposes of the following cases cited in the Court below:

COLWELL'S CASE.—He was brought into New York from Ontario, by extradition proceedings, for one offense and tried for another. Decided in 1871.

NOYES' CASE.—He was brought into New Jersey from York, by extradition proceeding, for one offense and tried on another.

Vol. 17, Law Journal 407. Decided in 1878.

The following cases, as between the States, were cited below:

DOWS' CASE.—He fled from Pennsylvania to Michigan. Governor of Pennsylvania issued requisition to Governor of Michigan, the requisition was honored and warrant issued by Governor of Michigan. Arrest made by party not having warrant and prisoner conveyed to

Pennsylvania and tried. Writ dismissed because no demand made by Governor of Michigan for return of prisoner.

18 Penn., 39. Decided in ——.

BAILEY'S CASE.—Proclamation by Governor of South Carolina: but no requisition; no officer or agent appointed by Governor of South Carolina to make arrest and no demand for return of prisoner, by Governor of North Carolina.

S. C. Law R., Vol. 1, p. 283. Decided in 1821.

ROSS AND MANN CASE.—Arrested in Missouri and brought back to Iowa without requisition or warrant Not arrested by officer or agent of Iowa, and no demand made by Governor of Iowa for return of prisoner.

21 Iowa, 467, 770. Decided in 1866.

All of foregoing cases, excepting Noyes' case, were decided before the act of 1867, extending *habeas corpus* protection to Constitutional guarantees; and the Noyes case has been overruled by Supreme Court U. S. in Rauscher's case, 119 U. S., 408.

As independent. sovereign States, it was the duty of each State to protect its citizens against the wrongful act of any foreign States.

A State that would fail to demand reparation for the kidnapping of her citizens by another State, or by the citizens thereof, and, in case of denial, support its demand by an appeal to arms, would have been unworthy a place amongst sovereign powers.

When the Constitution of the United States was formed, it was not the purpose of the States to abdicate the duty of protection to their citizens, whether against the unlawful acts of foreign countries, or of States of this Union.

In cases of wrongs committed against the citizens of the States, by a foreign country, the duty of the Federal government is plain, and has been performed effectually in important historic cases.

It would be a lamentable failure in the political organization of this country if one State can be guilty of such col-

duct towards another—and that, too, in plain violation of the Constitution of the United States—as would be cause for war as between independent sovereignties, and yet, the wronged State be remediless.

It is plain, common history, that when the convention of 1787 submitted the Constitution for ratification, it was en irely without that support to assure its adoption, until the general understanding was reached by the public men of the respective States, that such amendments should be made as would give the fundamental guarantees to life, lib erty, property, &c.

The fifth amendment, providing that "no person shall be deprived of life, liberty or property, without due process of law," was one of these guarantees submitted by the first Congress which convened under the Constitution.

The fourteenth amendment, providing that "no *State* shall deprive any person of life, liberty or property, without due process of law," is another guarantee, found necessary to secure absolutely, to the citizen, due process of law.

As an independent sovereignty the State had a right and duty to protect its own citizens against the act of kidnapping by the authorities of another State. The right and the duty remain the same, the remedy alone is changed. The remedy belonging to soverign power has been surrendered to the Federal government and lodged in its judicial department by the fifth and fourteenth amendments to the Constitution, securing to every citizen due process of law against the acts of both individuals and States.

Th'se Constitutional safeguards are co-extensive with the domain and citizenship of this government. They are neither the p'aythings of States nor the subjects of official legerdemain. They are not to be violated by arresting and carrying away the citizens of one State into another and there confining them in jail, and then evaded by the service of process. The rights of appellant, and the rights of West Virginia were violated in the arrest, and they were, and are now, violated in the detention It is the present right of appellant, and the right of West Virginia, that he be now within said State, and

that he may remain there until arrested and taken by due process of law.

Neither a State nor an individual can violate the Constitution with one hand, and evade it with the other. This, the State of Kentucky can do, if, by one of its agents or officers it can arrest a citizen of West Virginia within its territory, without warrant, and then by another of its agents or officers, legally, serve a process upon him in its name.

By Counsel for West Virginia and Plyant Mayhon.

April 20, 1888.

Enslan Gibson

127-700

127-700

Office Supreme Court U. S.
FILED.
APR 17 1888
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 1411.

PLYANT MAHON, APPELLANT,

vs.

ABNER JUSTICE, JAILER OF PIKE COUNTY, KY.

Appeal from the Circuit Court of the United States for the District of Kentucky.

MOTION TO ADVANCE.

The appellant, Plyant Mahon, comes and moves the Court that the above-entitled cause may be docketed and set for hearing on Friday, the 27th day of the present month; or, if the same cannot be heard on that day, then upon the earliest day during the present term which may be practicable thereafter, and for this motion assigns the following reasons:

I. He is now confined in the jail of Pike county, in the State of Kentucky, without the privilege of bail, and is, as he avers, unlawfully restrained of his liberty by the keeper of said jail, in violation of the Constitution and laws of the United States.

II. That the object of this proceeding is to secure his discharge from said unlawful imprisonment; and,

III. The next term of the State court in which he is held to answer, and at which he should be tried if not discharged by the judgment of this Court, will elapse before the beginning of the next term of this Court, and, inasmuch as no proceeding can be lawfully had in said State court pending this appeal, his trial in said court will be postponed and his imprisonment greatly protracted in the event of his failure to obtain a speedy hearing of his appeal by this Court; and for the further reason that eight other prisoners are confined in the same manner, and whose cases by agreement will abide this. These cases have created great uneasiness in a large section of country and broken reciprocal county relations between the States of West Virginia and Kentucky, and both States are anxious for a speedy settlement.

EUSTACE GIBSON,
Of Counsel for Appellant.

[Endorsed:] Supreme Court U. S. Oct'r term, 1887. No. 1411. Plyant Mahon, app't, *vs.* Abner Justice, jailer, &c. Motion to advance.

[Stamped:] Office Supreme Court U. S. Filed Apr. 17, 1888. James H. McKenney, clerk.

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1827-1900